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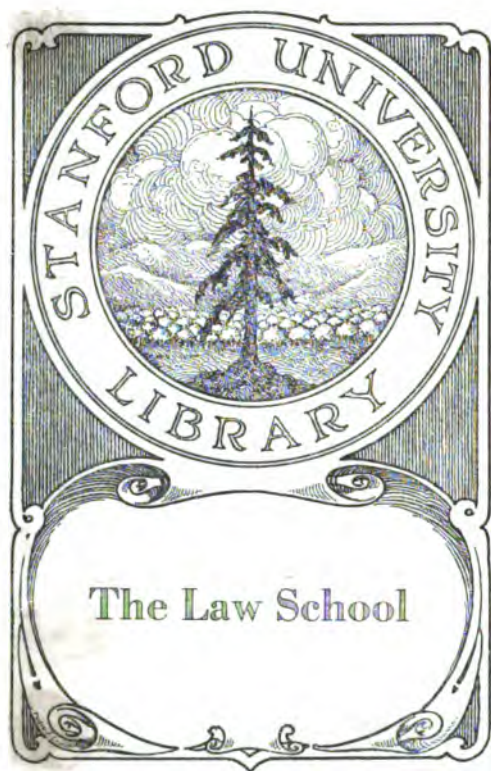
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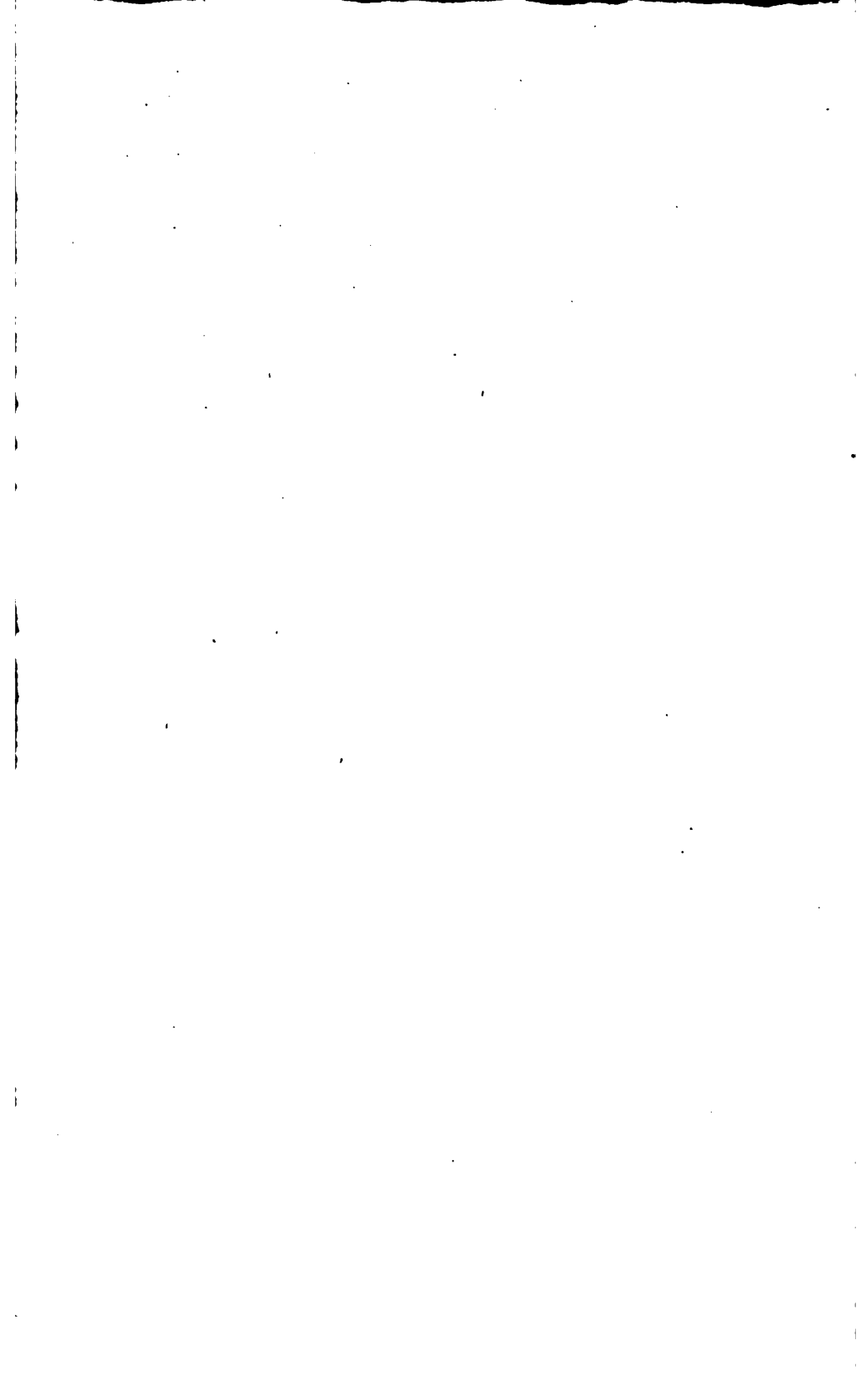
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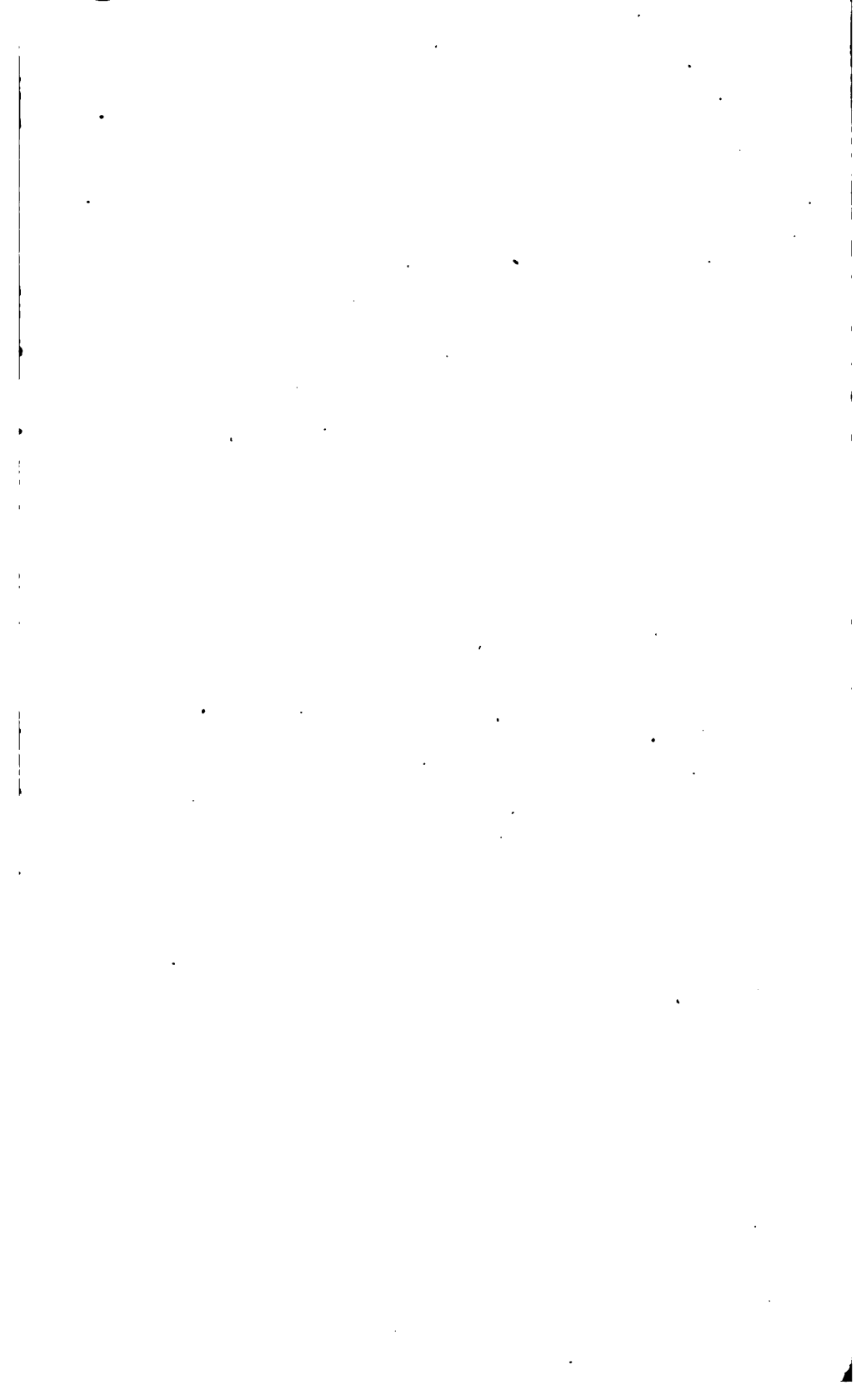
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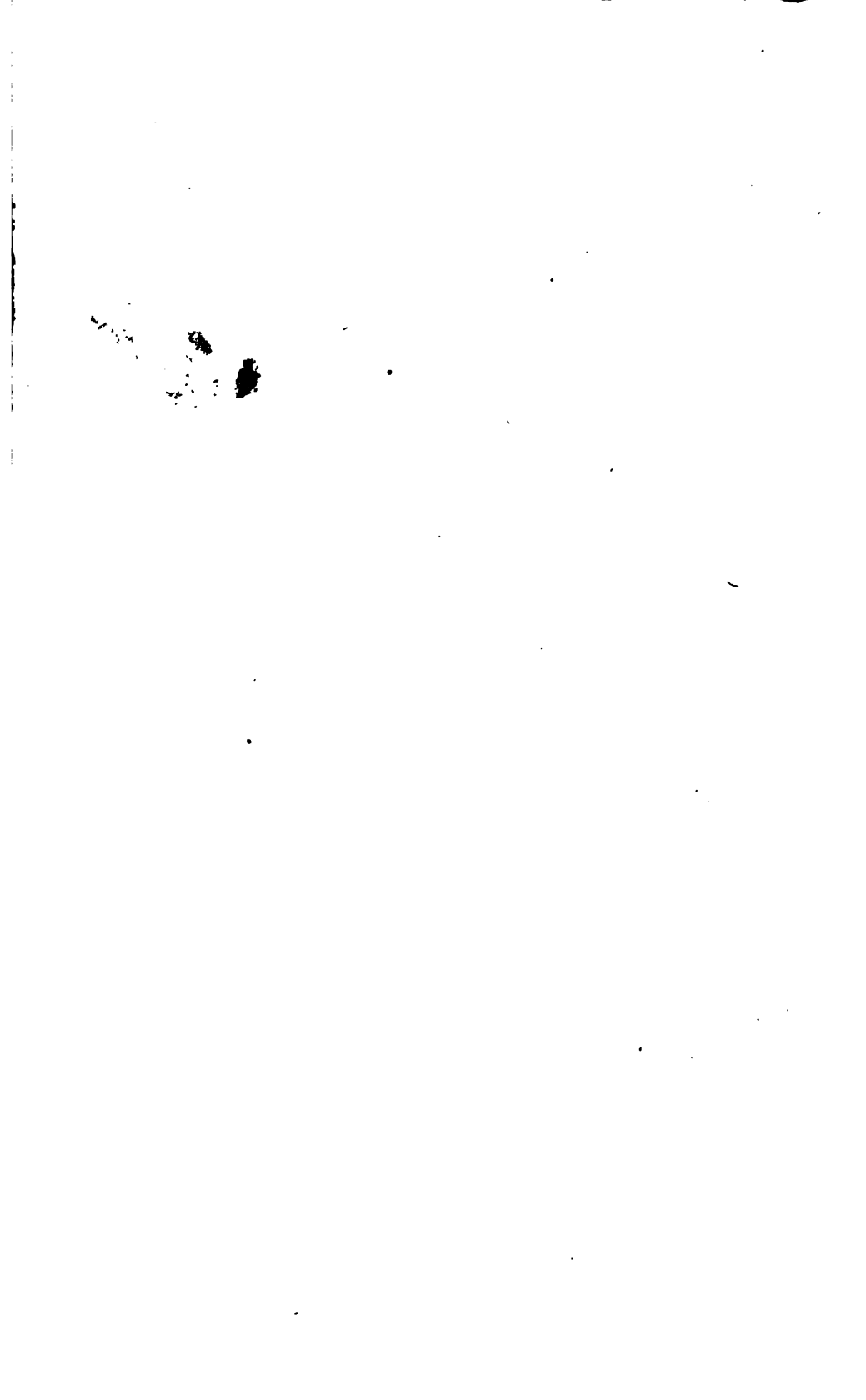
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

Gillaspie

HERETOFORE CONDENSED BY

HON. THOMAS SERGEANT AND JOHN C. LOWBER, Esq.,

Now Reprinted in Full.

VOL. VII.

CONTAINING

CASES IN THE KING'S BENCH, IN MICHAELMAS, HILARY, EASTER, AND TRINITY TERMS, 2 AND 3 GEO. IV., 1821, 1822; AND CASES IN THE COMMON PLEAS, AND OTHER COURTS, FROM TRINITY TERM, 2 GEO. IV., 1821, TO EASTER TERM, 3 GEO. IV., 1822, BOTH INCLUSIVE.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH.

WITH TABLES OF

THE NAMES OF THE CASES AND THE PRINCIPAL MATTERS.

BY

RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,

AND

EDWARD HALL ALDERSON, OF THE INNER TEMPLE,

ESQRS., BARRISTERS AT LAW.

VOL. V.

CONTAINING THE CASES OF MICHAELMAS, HILARY, EASTER, AND TRINITY
TERMS, 2 AND 3 GEO. IV., 1821, 1822.

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1869.

JUDGES
OF
THE COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

Sir CHARLES ABBOTT, Knt., Chief Justice.

Sir JOHN BAYLEY, Knt.

Sir GEORGE SOWLEY HOLROYD, Knt.

Sir WILLIAM DRAPER BEST, Knt.

ATTORNEY-GENERAL

Sir ROBERT GIFFORD.

SOLICITOR-GENERAL

Sir JOHN SINGLETON COPLEY.



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CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,

Gillaspie IN
Michaelmas Term,

IN THE
Second Year of the Reign of GEORGE IV. 1821.

VERNON v. SMITH.—p. 1.

A covenant to insure against fire premises situated within the weekly bills of mortality mentioned in 14 G. 3, c. 78, is a covenant that runs with the land.

COVENANT by the assignee of the lessor against the lessee. The declaration stated, that one J. Hance, the lessor, before the time of making the lease, was lawfully possessed of the tenements and premises for the residue and remainder of a certain term of years, whereof seven years were then unexpired; which tenements and premises, with the appurtenances, then were, and thence hitherto have been and still are situate within the weekly bills of mortality, mentioned in the 14 G. 3, c. 78; and being so possessed thereof, he, the said J. Hance, by indenture, demised and leased to the defendant the tenements and premises, with the appurtenances, habendum, for seven years, at a certain rent therein mentioned; covenant by the defendant that he should and would forthwith, at his own expense, and from time to time during the term, insure in some of the public offices in London or Westminster, for the purpose of insuring houses from casualties by fire, the messuage, dwelling-house, coach-house, stable, and premises thereby demised or thereafter to be erected and built thereon, to the amount of 800*l.*, in the joint names of the defendant, his executors, administrators, or assigns, and of Robert Stone, the ground landlord of the premises, his heirs or assigns; and should and would, at the request of Hance, or of the ground landlord, their heirs or assigns, produce the policy and receipts for such insurance. The declaration set out the proviso in the

lease for re-entry, on breach of any of the covenants. It then stated the defendant's entry into the premises, and that, after the making of the indenture, the term was assigned by Hance to the plaintiff. The breach assigned was, that the defendant did not insure. The second count stated, that, before the making of the demise to the defendant, in the first count mentioned, and also before and at the time of the making of the demise thereafter mentioned, Robert Stone was seized in fee of and in the said demised premises, and by a certain indenture, demised the same to J. Hance, habendum, for 85 years and six months. And that J. Hance, by that indenture, covenanted to insure the premises from fire, to the amount of three-fourths of the value thereof, in the joint names of himself and Stone, with a proviso for re-entry, in case of non-performance of the covenants. It then stated, that three-fourths of the value of the premises amounted to 800*l.*, and that, by reason of the said demised premises remaining uninsured, Stone brought an action of ejectment for the forfeiture, and the plaintiff was forced to pay the costs to him, amounting to 500*l.*, and also to sustain his own costs, amounting to 1000*l.* breach, that the defendant had not kept the covenant made by him, as stated in the first count. To this declaration, there was a general demurrer and joinder.

Comyn, in support of the demurrer. The assignee of the lessor cannot maintain this action, because the covenant to insure against casualties by fire is a mere personal covenant. Covenants which run with the land, must be such as affect the land itself, and not the collateral interest of the lessor. The rule upon this subject is accurately laid down in *Spencer's case*, 5 Coke, 17, *Bally v. Wells*, *Wilmot's Notes*, 344, and *The Mayor of Congleton v. Pattison*, 10 East, 130. In *Spencer's case*, it is expressly stated, that a covenant to pay a collateral sum to the lessor or a stranger shall not bind the assignee; because it is merely collateral, and in no manner touches or concerns the thing demised. By the covenant to insure, the lessee agrees to pay an annual sum to a stranger; in consideration of which that stranger is to pay to the lessee a certain stipulated sum, in case the premises should be injured by fire. There is not any stipulation that that sum, when recovered, shall be laid out upon the land; and, the tenant may, therefore, apply it to any other purpose. The covenant does not, therefore, in any respect affect the nature, quality, or value of the thing demised, independently of collateral circumstances; and, therefore, is not a covenant which passes to the assignee. Secondly, the nature of the covenant cannot be altered by the provisions of the 14 G. 3, c. 78, s. 88, which apply only to the case where an insurance has actually been made, and does not go to regulate the covenant between lessor and lessee. No insurance having been made in this case, it does not fall within the statute. Thirdly, the statute only enables the directors of the company, upon the request of the persons interested in the houses damaged by fire, or upon any ground of suspicion that the persons insured had been guilty of fraud, or of wilfully setting their houses on fire, to cause the insurance money to be expended in rebuilding the premises. Now, as it appears from the preamble of the clause that the object was to prevent fraudulent insurances, the power of the directors so to apply the money ought to be restrained to such cases only. Nor

does it apply to a case where the money has been disposed of among the contending parties, previously to the application of the parties interested. The statute, therefore, is not absolutely directory that the money recovered shall, at all events, be laid out on the premises, and, consequently, it does not alter the situation of the defendant in this case.

Chitty, contra. The lessee, having covenanted to cause the insurance to be effected in the joint names of the ground landlord and himself, could not, in the event of his having effected such an insurance, and a loss having afterwards occurred, have received the money, without the consent of such landlord, and a court of equity would have directed the money to be laid out in rebuilding or repairing the premises. The interest of the landlord is materially varied by the circumstance of the lessee being bound to insure; for, the rent reserved is decreased, in proportion to the amount of the annual premium paid, and the assignee of the lessor would take the premises at an increased rent, unless the lessee had covenanted to insure. The covenant, therefore, to insure affects the nature, quality, or value of the thing demised, and, therefore, is a covenant which runs with the land; and, it is quite clear, that, by the provisions of the 14 G. 3, c. 78, s. 83, the covenant to insure, in the present case, becomes, by operation of law, a covenant to lay out the money recovered in rebuilding the premises, at the request of the lessor; for the enacting part of the clause does not confine the power of the directors to lay out the money to cases of fraud, but is in the alternative, and enables them so to do in any case, upon the request of the party interested. Coupling, therefore, the covenant with the statute, it is, in effect, a covenant to lay out the money recovered in rebuilding the premises, in case the lessor requires it; and, that being so, it is clearly a covenant which respects the thing demised, and, therefore, passes to the assignee.

ABBOTT, C. J. It is not necessary, on the present occasion, to give any opinion on the effect of a covenant to insure premises situate without the limits mentioned in the 14 Geo. 3, c. 78. These premises lying within those limits, the effect of that statute is, to enable the landlord, by application to the governors or directors of the insurance office, to have the sum insured laid out in rebuilding the premises. Now a covenant to lay out a given sum of money in rebuilding or repairing the premises, in case of damage by fire, would clearly be a covenant running with the land, that is, such a covenant as would be binding on the assignee of the lessee, and which the assignee of the lessor might enforce. Here the defendant does not covenant expressly in those words, but only that he will provide the means of having 800*l.* ready to be laid out in rebuilding the premises in case of fire. But, connecting that covenant with the act of parliament, the landlord has a right to say, that the money, when recovered, shall be so laid out. It is, therefore, as compulsory on the tenant to have the money laid out in rebuilding, and as beneficial for the landlord as if the tenant had expressly covenanted that he would lay out the money he received in respect of the policy upon the premises. For these reasons, I think that this is a covenant running with the land, for the

breach of which the assignee of the lessor may sue ; and, consequently, there must be judgment for the plaintiff.

BAYLEY, J. I am clearly of opinion, that the assignee of the reversion is entitled to sue upon the covenant in question. The rule is, that if the covenant respect the thing demised, and be co-extensive with the estate of the person to whom it is made, and be made with him and his assigns, it passes to his assignee. The only question in this case is, does this covenant respect the thing demised ? It is a covenant to insure the premises against damage by fire. By the operation of the 14 Geo. 3, c. 78, s. 83, the effect of that insurance is not merely to put into the pocket of the person effecting it, in case of loss, the amount of the money insured, but to entitle the owner of the estate to have that money laid out on the land ; and if such be the effect of the covenant, it does affect the thing demised, as much as a covenant to repair or rebuild, in case of damage by fire. I think, therefore, that there must be judgment for the plaintiff.

HOLROD, J. I am of the same opinion. If the covenant to insure to the amount of 800*l.*, in case of fire, could be considered as a covenant to pay a collateral sum to the lessor, the present action could not be supported ; but taking that covenant, together with the stat. 14 G. 3, c. 78, s. 83, I think that the sum insured is not to be considered as a collateral sum, but as a sum, which, by operation of law, must be laid out upon the premises. It is, therefore, a covenant to do a matter which concerns the land, and falls within the rule laid down in *Spencer's* case, and by Lord Chief Justice WILMOT in *Bully v. Wells*. He there lays it down thus : "Covenants in leases, extending to a thing 'in esse,' parcel of the demise, run with the land, and bind the assignee, though he be not named, as to repair, &c. And if they relate to a thing not 'in esse,' but yet the thing to be done is upon the land demised, as to build a new house or wall, the assignees, if named, are bound by the covenants ; but if they in no manner touch or concern the thing demised, as to build a house on other land, or to pay a collateral sum to the lessor, the assignee, though named, is not bound by such covenants ; or if the lease is of sheep or other personal goods, the assignee, though named, is not bound by any covenant concerning them. The reasons why the assignees, though named, are not bound, in the two last cases, are not the same. In the first case, it is because the thing covenanted to be done has not the least reference to the thing demised ; it is a substantive, independent agreement, not 'quodam modo,' but 'nullo modo,' annexed or appurtenant to the thing leased. In the case of the mere personality, the covenant doth concern and touch the thing demised ; for it is to restore it or the value at the end of the term ; but it doth not bind the assignee, because there is no privity, as there is in the case of a realty between the lessor and lessee and his assigns, in respect of the reversion ; it is merely collateral in one case ; in the other it is not collateral, but they are total strangers to one another, without any line or thread to unite and tie them together ; and to constitute that privity which must subsist between debtor and creditor to support an action." And in page 346, after citing several cases from which he deduces the principle laid down, he says, "All these cases clearly prove, that 'inherent' covenants, and such as

tend to the support and maintenance of the thing demised, where assigns are expressly mentioned, follow the reversion and the lease, let them go where they will." In the present covenant, assigns are expressly included; and, inasmuch as the performance of the covenant would, in the event of the premises being destroyed or injured by fire tend to the support and maintenance of the thing demised, I am of opinion, that it falls within the rule laid down by Lord C. J. WILMOT, and, consequently, that there must be judgment for the plaintiff.

BEST, J. It has been argued from the preamble to the 83d section of the 14 G. 3, c. 78, that this provision of the statute only applies to cases where fraud is suspected. But the enacting part of the clause goes beyond the mischief mentioned in the preamble, and is large enough to embrace this case. For, under the first branch of it, where the owner of the building requests the insurance company so to apply the money, no suspicion of fraud is necessary to make such request compulsory on the directors. Within the district, therefore, to which the building act applies, this covenant provides a fund for the rebuilding of the premises, which the owner has a right to require, shall be applied to that purpose; and then it is clear, that the assignee has a direct interest in having the insurance kept up. But I think, also, that if the premises were in any other part of the kingdom, this would be a covenant that would pass to an assignee. A covenant in a lease which the covenantee cannot, after his assignment, take advantage of, and which is beneficial to the assignee as such, will go with the estate assigned. If this were not the law, the tenant would hold the estate discharged from the performance of one of the conditions on which it was granted to him. The original covenantee could not avail himself of this covenant; he sustains no loss by the destruction of the buildings, and therefore has no interest to have them insured. In *The Saddler's Company v. Badcock*, 2 Atkyns, 577, Lord HARDWICKE says, that Lord Chancellor KING, in the case of *Lynch v. Dayrell*, held, that a person who had assigned his interest in the house before the fire happened which consumed it, had no right to the money under the policy. I cannot say whether a court of equity would take any steps to secure the application of the money insured for the benefit of the estate. I presume, that if a court of equity would assist a covenantee to have the money, recovered under the policy by his tenant, expended on the estate, it would render the same assistance to an assignee. If a court of equity will not interfere, either for the one or the other, still this covenant is as beneficial to an assignee as it was to the covenantee. It secures to the tenant the means of performing his covenant, and to the landlord, a solvent instead of a ruined tenant. It is a covenant beneficial to the owner of the estate, and to no one but the owner of the estate; and therefore may be said to be *beneficial to the estate*, and so directly within the principle on which covenants are made to run with the land. At the same time that the 32 Hen. 8, c. 34, was passed, an immense quantity of land passed from the dissolved monasteries to the king, and from the king to the most favoured and powerful of his subjects. Much of this land was on lease, and both the king and his parliament must have been anxious that the assignees of the reversion should be in as good a situation as the lessors were. This statute ex-

pressly enacts, "that grantees of estates shall have and enjoy the like advantages against lessees, their executors, &c., by entry for non-payment of rent, or for doing of waste or other forfeiture, and the same benefit and remedy by action for not performing of other conditions, covenants, or agreements, as the lessors or grantors themselves might have had." Lord COKE (Co. Litt. 215 b) limits the operation of these general words, to "such conditions as are incident to the reversion as rent, or for the benefit of the estate." He adds, that the statute does not extend to "covenants for payment of a sum in gross, delivery of corn, wood, or the like." A sum in gross is in the nature of a fine which belongs to the lessor, and can never be intended for an assignee. By the deliveries of corn and wood were meant deliveries of those articles at the mansion-house of the lessor, and not rents payable in corn or wood, without any stipulations as to the place where the articles were to be delivered. These deliveries at the mansion-house were inconsiderable in value, and would be of no use to the assignee, unless he became the assignee of the mansion as well as the farm. In 5 Coke, 18, it is said, "that the 32 H. 8, was resolved to extend to covenants which touch or concern the thing demised, and not to collateral covenants." In *Spencer's* case, Moore, 159, the same doctrine is laid down in the same terms, and this case is put by GAWDY, J., and assented to by all the judges and serjeants, "that a covenant that a leesor will, at the end of the term, grant another lease, runs with the land. The covenant here mentioned is not beneficial to the estate granted, in the strict sense of the words, because it has no effect until that estate is at an end, but it is beneficial to the owner, *as owner*, and to no other person. By the terms *collateral covenants*, which do not pass to the assignee, are meant such as are beneficial to the lessor, without regard to his continuing the owner of the estate. This principle will reconcile all the cases. In *Webb v. Russell*, 3 Term, Rep. 402, Lord KENYON considers grantees or assignees to stand in the same situation, and to have the same remedy against the lessees, as heirs at law of individuals, or successors in the case of corporations, had before the statute. For these reasons, I am of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

WESTCOTT v. HODGES.—p. 12.

A., B., and C. entered into a bond to the king, the condition of which was that A., as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum; and also the price of such vellum, together with all moneys which he should receive on account of the duties on personal legacies and stage coaches. A., as subdistributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. *A sci. fa.* having afterwards issued upon the bond, B., one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same: *Held*, in an action brought by the surety to recover these sums from the bankrupt, that A. was a person "surety for, or liable for a debt" of the bankrupt, within the meaning of the 49 G. 3, c. 121, s. 8: and, consequently, that the latter was protected by his certificate: *Held*, also, that the general plea of bankruptcy was well pleaded.

THE declaration, after stating the appointment of the defendant to be a sub-distributor of stamps, alleged that, "in consideration that the plaintiff, at the request of the defendant, would execute a certain writing, obligatory to his majesty, in the sum of 500*l.*, as a security for the defendant, and with a condition, that the defendant should account for all vellum, parchment, &c., he, defendant, promised to save and keep plaintiff harmless and indemnified from all damages, costs, &c., that he should sustain in consequence of the plaintiff's executing the writing obligatory, or by reason of the defendant's breach of the condition thereof." Averment, that the plaintiff executed the bond; that defendant, having broken the condition, and the bond having thereby become forfeited to the king, a *scire facias* issued against the plaintiff and defendant, and one C. F., and that such proceedings were thereupon had; that the plaintiff, to avoid paying the 500*l.* due on the bond, was forced to pay 50*l.* to compromise the suit, and also 61*l.* 1*s.* 9*d.* for his costs, charges, and expenses. Plea, that, before the commencement of this suit, defendant became bankrupt, and that the cause of action accrued before his bankruptcy.

The cause was tried before GRAHAM, Baron, at the Hants Summer assizes, 1819, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

The defendant having been appointed sub-distributor of stamps for the town of Ringwood, in the county of Southampton, he, together with the plaintiff and one Finch, as his sureties, on the 6th of February, 1812, entered into a joint and several bond for 500*l.* to his majesty; the condition of which was, that if the defendant should well and truly account for all vellum, &c., duly stamped, which he should receive from the commissioners or head distributor of stamps, and for all sums of money which he should receive on account of the duties on personal legacies and stage-coaches, and should pay to such commissioners or head distributor the duties payable for such stamped vellum, &c., and also the price of such vellum, &c., and the duties received by him, in respect of personal legacies and stage-coaches; then, the obligation to be void. In December, 1813, the defendant duly rendered to the head distributor of stamps an account of the money due from him as sub-distributor, by which he made himself debtor for 301*l.* In March, 1814, he was declared a bankrupt; and the plaintiff and one Corbin were appointed assignees, but no dividend has yet been made. He obtained his certificate on the 23d of May, 1814. In June, 1815, a *scire facias* issued against all the parties to the bond, at the suit of the king; and, the plaintiff, on the 15th November, 1817, paid the sum of 50*l.* to compromise that suit. The costs of defending the suit amounted to 61*l.* 1*s.* 9*d.* For these sums the present action was brought.

E. Lawes, for the plaintiff, made two points; first, that the statute of the 49 G. 3, c. 121, s. 8, must be specially pleaded, and could not be given in evidence under the general plea of bankruptcy, given by stat. 5 G. 2, c. 30, s. 7. *Stedman v. Martinnant*, 12 East, 664. And although in that case the immediate point in judgment was, whether defence given by the 49 G. 3 was available under the general issue; yet, it appears, by a subsequent report of that case, 13 East, 427, that

the defendant, in consequence of the decision of the Court upon the point of pleading, afterwards pleaded a special plea of bankruptcy. It was quite incongruous for the defendant to plead, that the cause of action accrued before the bankruptcy, when he meant to rely on a particular statute, applicable only to the case of its having accrued after the bankruptcy. And such form of pleading would mislead the plaintiff, instead of giving him any idea of the true nature of the defence. The words of the statute are, that the bankrupt should be discharged of all demands in like manner, to all intents and purposes, as if the surety had been a creditor before the bankruptcy; but, it does not give any precise form of plea, much less does it require the same form of plea as is given by the stat. 5 G. 2, c. 30, s. 7. Secondly, the bond is, in its nature, wholly incapable of valuation; and, therefore, not proveable under the commission. *The Overseers of St. Martin v. Warren*, 1 Barn. & Ald. 495. It is a bond for the performance of several things, the non-performance of which would only entitle the plaintiff to unliquidated damages; and, it cannot be treated as a divisible bond, so as to allow it to be proved under the commission for damages arising by the breach of one part of the condition, leaving the bond still in force as to the residue. *Taylor v. Young*, 3 Barn. & Ald. 525. The statute 49 G. 3, c. 121, s. 8, was not meant to discharge the bankrupt from any demand, in respect of payment made after the commission, where he would not have been discharged from it by the statute 5 G. 2, c. 30, if payment had been made before the bankruptcy. But this case is not within that statute; first, because the plaintiff was not surety for any debt; secondly, he had not paid the whole debt, or any part thereof, in discharge of the whole. If there was any debt, it was the penalty of the bond; and, even if the damages sought to be recovered by the crown are considered as the debt, the 50*l.* paid by way of compromise for it was not a legal discharge of the debt, without a release. *Fitch v. Sutton*, 5 East, 230. Thirdly, the statute did not contemplate the case of a surety in a bond to the king, but to a common creditor only, who might or might not prove his debt under the commission, and be barred by such proof; whereas, there is no instance of the crown proving under a commission of bankrupt, nor is the king barred by any of the statutes of bankruptcy, not being specially named in them.

ABBOTT, C. J. I am of opinion, that the plea is good, both in form and substance, and that this case falls within the 49 G. 3, c. 121, s. 8. The words of that statute are very large. It enacts, "that where, at the time of the issuing the commission, any person shall be surety for, or liable for any debt of the bankrupt, it shall be lawful for such surety, or person liable, if he shall have paid the debt, or any part thereof, in discharge of the whole debt, although he may have paid the same after the commission shall have issued, and the creditor shall have proved his debt under the commission, to stand in the place of the creditor as to the dividends upon such proof; and, when the creditor shall not have proved under the commission, it shall be lawful for such surety or person liable to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and to receive a dividend proportionably with the other creditors taking the

benefit of such commission, notwithstanding such person may have become surety or liable for the debt of the bankrupt, after an act of bankruptcy had been committed by such bankrupt; and, every person against whom such commission of bankrupt has been awarded, and who has obtained his certificate, shall be discharged of all demands," &c. In order to bring the case within the statute, it is not necessary that the principal creditor should be enabled to prove, or that the bankrupt should be discharged by his certificate, if he does not; and, it seems to me, that this case does not differ from the case of a surety in a bond to a private person. It has been contended, that this is not to be considered as a debt; but, we are of opinion, that it may be considered as a debt, in the strictest sense of the word. In the first place, the penalty might be sued for as a debt at law. Besides, debts may arise out of the breach of the condition of a bond, framed as this is; for, a debt is thereby created, as much as in the case of a contract for goods sold and delivered, or money had and received. For these reasons, we are all of opinion, that this is a case coming within the section of the statute. Another point has been made upon the form of the pleadings, viz.: that the bankruptcy should have been specially pleaded. We are, however, of opinion, that the general plea is sufficient in this case. There is no decision to show, that the plea in the general form will not do. Now, the 49 G. 3, c. 121, s. 8, enacts, "that the bankrupt who has, or shall obtain his certificate, shall be discharged at the suit of every such person, having so paid, or being thereby enabled to prove as aforesaid, or to stand in the place of such creditor as aforesaid, with regard to his debt, in respect of suretyship or liability, in like manner to all intents and purposes, as if such person had been a creditor before the bankruptcy." Now, we think the obvious meaning of this is, that the bankrupt should have the same benefit of a precise form of pleading, as if the debt had arisen before the bankruptcy, and that a payment made by a surety, after the bankruptcy, places the party in the same situation as if the payment had been made before the bankruptcy by any other person. We are, therefore, of opinion, that the plea is good, both in substance and form; and, consequently, that the *postea* must be delivered to the defendant.

Judgment for defendant.

DOE dem. JOHN MURRELL and EDWARD LIVERMORE v.
ROBERT DEVEREUX FANCOURT HURRELL and Others.—
p. 18.

A testator having both real and personal estate, after giving several pecuniary legacies, bequeathed all the rest and residue of his estate and effects, whatsoever and where soever, to trustees, their executors, administrators, and assigns, upon trust; that they should, out of such residue of the moneys and effects that he should die possessed of, carry on, manage and cultivate the farm then in his possession for the remainder of his term therein, for the joint advantage of certain of his sons and daughters therein named: and, at the expiration of the said term, upon further trust, to sell and dispose of such residue of his estate and effects, or such effects as should then be upon his said farm, and to divide the money arising therefrom among his said sons and daughters: *Held*, that the testator's real estate did not pass by this will.

EJECTMENT, to recover the possession of certain premises in the county of Essex. The cause was tried at the Essex Spring assizes, 1820, before GARROW, B., when the jury found a verdict for the lessors of the plaintiff, subject to the opinion of the Court, on the following case.

On the 21st of May, 1805, Moses Hurrell the elder, being seized in fee of the freehold premises in question, and being also possessed of personal property, made his last will, duly executed to pass real estates, as follows: "I give unto my sons, John, Aaron, William, Charles and Thomas, and to my daughters, Susanna and Rebecca, the sum of 100*l.* apiece, to be paid to such of them as shall be under the age of 21 years at the time of my decease, upon their attaining the respective ages of 21 years; and to such of them as shall have attained their respective ages of 21 years at that time, within six months after my decease; with benefit of survivorship among them, in case of the death of any or either of them under the age of 21 years. And as I have already provided for my son Moses, and my daughter Sarah, the wife of Edward Livermore, I do hereby only give them the sum of 10*l.* apiece for mourning, to be paid to them respectively within six months after my decease. And after payment of the above-mentioned legacies, my just debts, funeral, testamentary, and other incidental expenses, I give and bequeath *all the rest and residue of my estate and effects whatsoever and wheresoever*, unto my brother, Aaron Hurrell, my said son John, and my said son-in-law, Edward Livermore, their executors, administrators, and assigns, upon the following trusts; that is to say, upon trust, that they shall, out of such residue of the moneys and effects that I shall die possessed of, carry on, manage, and cultivate the farm now in my possession, for the remainder of my term and interest therein, for the joint advantage of my said sons, John, Aaron, William, Charles, and Thomas, and my said daughters, Susanna and Rebecca; and at the expiration of the said term, upon further trust, to sell such residue of my estate and effects, or such effects as shall then be upon my farm, and divide the money arising among his said last-mentioned five children. And I do hereby appoint my brother Aaron Hurrell, my said son John, and my son-in-law, Edward Livermore, executors of this my will."

The testator died in February, 1807, and on the 25th March, 1 08, the will was duly proved by the executors. The tenant in possession of the estate under the testator, after his death, paid one half-year's rent, due for the premises, at Lady-day, 1807, to the lessors of the plaintiff, who are the surviving devisees in the will, and to the said Aaron Hurrell, since deceased; after which payments, the said Robert Devereux Fancourt Hurrell being the heir of the testator, in that character and right, entered into possession of the estate and premises, and he, together with the other defendants, hath thence and hitherto retained possession thereof.

Sugden, for the plaintiff. The real estate passed by this will to the trustees. The object of the testator was to provide for all his children, and he gives and bequeaths all the residue of the estate and effects to the trustees, for that purpose. If the will had stopped here, it is quite clear, that the real estate would have passed by those words; but, it goes on, "In trust, out of such residue of the moneys and effects, to manage his farm to the end of his term." It may, therefore, be said, that the testator only meant to give to them the residue of his moneys and effects; but then, the trustees, at the expiration of the term, are directed to sell and dispose of the residue of his estate and effects, and, therefore, the testator must have intended more to pass than his moneys and effects. Besides, the real estate will pass under these words, provided it appear, from the other part of the will, that he intended it to pass. *Doe, Lessee of Wall, v. Langlands*, 14 East, 370, and *Doe dem. Andrew v. Lainchbury*, 11 East, 290. Now, here, by the use of the words, "residue of his estate and effects," it does appear, that the testator meant the real estate to pass.

H. J. Stephen, contra, was stopped by the court.

ABBOTT, C. J. We are clearly of opinion, that the testator did not mean that his real estate should pass by this will. We must collect the intention from the whole context of the will. There can be no doubt, that words, which in their technical sense, generally denote personal property, will pass the real estate, if such appears from the whole of the will, taken together, to have been the intention of the testator. It is quite clear, that the testator here intended that his personal property only should go to the trustees. The bequest is to them, their executors, administrators, and assigns; the word "heirs" is not used. That circumstance is not indeed very strongly to be relied on; but it is not to be altogether rejected in construing this will. The nature of the trusts clearly shows, that the testator meant to bequeath his personal property only, for the trustees are directed, out of such *residue* of the moneys and effects, to manage the farm for the remainder of his term. Now the real estate was not applicable to such a purpose, for the trustees, at all events, had no power to sell any part of the estate bequeathed to them, until the end of the term. Then the testator directs the trustees, at the expiration of his term, to sell such residue of his estate and effects; *or such effects as shall be* upon his said farm. It appears to us, therefore, that, by using the latter word, he himself has furnished a comment upon the words *the residue of his estate and effects*; and that by those words, he meant only such estate and effects

as constituted personal property. Inasmuch, therefore, as it was not necessary that the trustees should take the real estate, and as it was not suitable to the purposes of the trust, we are of opinion that the real estate did not pass by the will, and, consequently, that there must be judgment for the defendants.

Judgment for defendants.

STEELE v. MANNS.—p. 22.

A. having purchased an estate free from rectorial tithe, with a right of common thereto annexed, the common was afterwards inclosed under an act of parliament, and certain land was allotted to A. in lieu of his said right of common: *Held*, that no tithe was payable in respect of the allotted land.

THE plaintiff declared in debt upon the statute 2 and 3 Edward 6, c. 13, as the farmer and proprietor of the tithes of corn arising from land in the parish of Catherington, in the county of Southampton, against the defendant, as occupier of land in that parish, and charged that the defendant had carried away his corn, without setting out the tithe; whereby, an action had accrued to the plaintiff, to demand and have of the defendant treble the value of the said tithe. Plea nil debet. At the trial before GRAHAM, Baron, at the Summer assizes, 1819, for the county of Southampton, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

The plaintiff claimed the tithes in question, as the tenant for an unexpired term of years, of Sir Lucas Curtis, the lay impropriator of the rectorial tithes of the parish of Catherington. By an enclosure act of the 50 G. 3, c. 218, for disafforesting the forest of Bier, in the county of Southampton, and for enclosing the open commonable lands within the forest, after reciting (section 41) that the 600 acres of land thereby vested in his majesty, being taken out of different parishes, the persons entitled to the tithes of such parishes might be injured thereby, it was enacted, that out of the said open commonable lands thereby directed to be divided and enclosed, allotments should be made to the persons entitled to the tithes of such parishes, of so much land as should be, in the judgment of the commissioners, a full compensation for such injury. And, it was further enacted, (section 42,) that the commissioners should, in the next place, allot the residue of the said open commonable lands and grounds respectively to, and among, the persons entitled to commonage. "Provided, (section 43,) that nothing in the said act shall extend, or be construed to extend, so as to prejudice, lessen, or defeat the right, title, or interest of the several rectors, vicars, and lay impropriators, of the several and respective parishes, townships, hamlets, or places of Soberton, Hambleton, Catherington, &c., or any person or persons whomsoever, in, or to any tithes, great or small, arising or renewing out, or payable for, or in respect of any lands, tenements, hereditaments, within the same several parishes, &c.; but, such great and small tithes shall be paid and payable, at all times hereafter, in

such and the same manner as they would have been, in case this act had not been made." Before and at the time of passing of this act of parliament, John Ring, esquire, was the owner of an estate at Love Dean, in the parish of Catherington; and the tithes arising from such estate, for which estate, as consisting of 120 customary acres, of arable, pasture, and coppice land, in the occupation of Edward Manns, free from rectorial tithe, (but which tithe had been purchased with the estate,) situate, and being at Love Dean, in the parish of Catherington, he claimed a right of common from the commissioners under the foregoing act, who thereupon awarded to Mr. Ring, in right of the last-mentioned estate, five acres and seventeen perches of the open and commonable lands of the forest of Bier, situate in the parish of Catherington. The defendant, John Manns, became the tenant of two acres, part of such five acres and seventeen perches so allotted to Mr. Ring, and, in the year 1817, sowed such two acres with oats, and afterwards cut and carried away the crop, without setting out the tithe. The tithe was demanded, but refused, on the ground that, as the allotment had been made in respect of land not paying tithe, the allotted lands were exempt from the payment of tithe.

Schoyn, for the plaintiff, contended, that he was entitled to recover. It does not appear, whether the right of common, in respect of which the allotment was made, was tithe free. The language of the conveyance might or might not be large enough to convey to Mr. Ring the tithes of the common. In *Lord Gwydir v. Foakes*, 7 T. R. 641, it was holden, that, by a grant of all tithes arising out of, or in respect of farms, lands, &c., the tithes arising out of, and in respect of common appurtenant to such farms or lands will pass. Here, however, no conveyance is stated, and it is rather to be collected from the language of the case, that the tithes of the estate alone, and not the tithes of the right of common appurtenant to such estate, had been purchased. If this view of the case be correct, it can hardly be contended, that the common being liable to the tithes, the allotment in lieu of it would be exempt. Indeed, the contrary would follow, as appears from *Moncaster v. Watson*, 3 Burr. 1375, 1 Bl. 402, S. C. But, admitting that the right of common were tithe free, would it be a necessary consequence, that the land allotted in lieu thereof should also be tithe free? The demand of the impropiator in the present case, is a demand of the tithe of corn. But, corn could not be part of what grew upon the common; the tithes that arose in respect of the common, could only have been tithes of agistment, or of lambs, calves, wool, milk, and other things that could be the produce of a common. Suppose the owner of a farm, liable to tithes of corn, and also to an agistment tithe, should agree with the person that he should hold his land free of agistment tithe, and afterwards, upon a demand made of the tithes of corn, should plead this agreement, it would hardly be considered as an answer to the demand. The case of *Stockwell v. Terry*, 1 Ves. 117, is distinguishable from the present; for there, there was an express agreement, that the parties should enjoy their rights in severalty, as they did their rights of common. And Lord HARDWICKE, in delivering his opinion, mainly relied on that agreement. Here there is no such express agreement, and none can

be implied; for a claim of tithe can only be discharged by special words. *Parkins v. Hinde*, Cro. Eliz. 161.

E. Lawes, contra, was stopped by the Court.

ABBOTT, C. J. I am clearly of opinion, that the plaintiff is not entitled to recover. The facts are these: John Ring, being the owner of an estate of 120 acres, and the tithes arising therefrom, (which tithes he had purchased with the estate,) had allotted to him, under an enclosure act, certain land in lieu of a right of common appurtenant by custom to his estate. The plaintiff, who is the tenant of the lay impropriator, claims tithe in respect of such allotted land, and the question substantially is, whether the lay impropriator, who has sold the tithe of the estate, is entitled to the tithe of land allotted to the owner of that estate, in lieu of a right of common, which was appurtenant by custom to the land. It is quite clear, that after the lay impropriator had thus sold the tithes of the estate, no tithe was payable at least before the passing of the enclosure act. Before the sale, the tithe was payable equally in respect of all cattle feeding on the enclosed as on the common land. When the lay impropriator sold the tithes of the estate, he therefore sold all the tithes in respect of all cattle feeding, both upon the enclosed and the common land. And I am of opinion, that, inasmuch as no tithe was payable before the enclosure act, in respect of the cattle feeding on the common land, no tithe is payable now in respect of the land allotted to the owner of the estate, in lieu of such right of common. This case is very distinguishable from the case of *Moncaster v. Watson*, 3 Burr. 1375, for the land, in respect of which the allotment was there made, was not wholly free from the payment of tithes: the exemption claimed was merely from the tithe of corn, grain, and hay, neither of which the common, while unenclosed, was capable of producing. The tithe of agistment would, therefore, remain payable, notwithstanding the exemption. Here, the owner of the land is the owner of the tithes, for the effect of the conveyance must have been to make the owner of the estate the owner of all the tithes of the land; and I am of opinion, that the owner of the estate becomes the owner of the tithes of land allotted to him, in respect of a right of common appurtenant to that estate. The *postea* must, therefore, be delivered to the defendant.

HOLROYD, J. I am of the same opinion. I am quite satisfied, from the case of *Stockwell v. Terry*, and the reasoning of Lord KENYON, in the case of Lord *Gwydir v. Foakes*, 7 T. R. 641, that the plaintiff is not entitled to the tithes of the allotted land; but that the person who is entitled to the tithes arising out of the estate, is also entitled to the tithes arising out of the allotted land, in like manner as he would have been entitled to tithes arising out of the beneficial enjoyment of the right of common appurtenant to that estate, in case the enclosure act had never passed.*

BEST, J., concurred.

Judgment for defendant.

* Bayley, J., was absent at Chambers.

HUDSON v. GRANGER.—p. 27.

The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale; the factor being also similarly indebted to I. S. sold the goods to him. The factor afterwards became bankrupt; and on a settlement of accounts between I. S. and the assignees, I. S. allowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate; *Held*, that as the factor had a lien on the whole price of the goods, such settlement of the accounts between the vendee and the assignees, afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner.

By 47 G. 3, sess. 2, c. 28, s. 29. "All contracts for coals are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of the market." A factor having coals consigned to him for sale by A. sold the same, and entered the contract in his book as having been made for C. the master of the ship. It was not signed by the purchaser; but in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, was inserted; the factor had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. Query, whether, under the circumstances, an action might be brought in the name of C. for the price of the coals.

ASSUMPSIT for the price of the coals. The declaration contained two special counts on a contract between the parties, and also counts for goods sold and delivered. At the trial before Lord ELLENBOROUGH, C. J., at the sittings after Michaelmas term, 1817, a verdict was found for the plaintiff for 110*l* 6*s*. 6*d*., subject to the opinion of the Court on the following case:

The plaintiff was the owner or master of the ship *Maria*, and was employed in the coal trade by one John Hollowell, who was owner of the cargo of coals by that ship, a part of which was the subject of this action. The ship and cargo were addressed by Hollowell to Robert Clark, a factor. On the 10th of April, 1816, the defendant agreed with Clark to purchase of him part of the *Maria's* cargo, and in the contract entered by the factor in his book, the coals were stated to be purchased of Robert Clark, factor for Hudson, master or owner of the ship *Maria*. It was not signed by the defendant, or any person by him authorized, but in the copy delivered by the factor to the clerk of the market, the names of the defendant and of the factor were inserted at full length. By the 47 G. 3, sess. 2, c. 68, (local and personal,) sec. 29, it is enacted, "that all contracts for coals between buyer and seller, shall, by the crimp factor, be fairly entered with the conditions thereof, and price of such coals, in a book to be kept by such crimp factor, subscribed by such buyer, and by the crimp factor, with their names written at full length, and a true and perfect copy of such contract, and the price of such coals, shall be delivered by such crimp or factor to the clerk of the market within one hour after the close of the market on that day, for the inspection of any person." Clark was authorized by Hollowell, not only to sell, but to receive the price of the coals. Hudson had no interest in the cargo, and his name was inserted in the contract without his authority, it being the usual practice so to insert the name of the master. The coals were delivered to the defendant, pursuant to the contract. In June, 1816, Clark became a bankrupt. At the time of the purchase, Clark, who,

for a considerable time, had had dealings with the defendant, was indebted to him in 272*l.* 5*s.* 4*d.*, for money lent and advanced to, and paid for Clark in the regular course of business; and in the month of January, 1817, prior to the plaintiff bringing this action, an account was settled between the defendant and the assignees under Clark's commission, in which the assignees allowed the defendant to deduct the price of the coals from the debt due to the estate, and he then proved the balance under the commission. At the time of the sale of the coals, and continually from thence up to the time of the bankruptcy of Clark, Hallowell (who has also since become bankrupt) was indebted in a considerable sum to Clark, and after giving credit to Hallowell for the price of the coals on the Maria, the balance remained considerably in favour of Clark.

F. Pollock for the plaintiff. This action is maintainable in the name of Hudson, because he was the person whose name was entered in the book of the factor, and also in the copy delivered to the clerk of the market. The defendant, therefore, might have learnt with whom the contract was made, and he cannot now be allowed to say, that the contract was not made with the present plaintiff. If the defendant had signed the contract, as required by the 47 G. 3, c. 68, there can be no doubt that the plaintiff might have sued. Assuming, however, that the action was maintainable in the name of Hudson, the settlement which has taken place between the defendant and the assignees of the bankrupt, cannot operate as any answer to the present action, for admitting, that this case must be considered as if the action were brought in the name of Hallowell, this settlement took place after the bankruptcy of Clark; and, although a payment to him before his bankruptcy would have been a valid payment, as against his principal, because he had authority to receive the money, yet his bankruptcy was a revocation of that authority, and, therefore, the payment was not made to an agent authorized to receive it, and consequently is not a valid payment as against Hallowell.

Gaselee contra. The bankruptcy of the factor would certainly operate as a revocation of his authority to receive payment on account of his principal. Here, however, the payment was made, not merely on the account of Hallowell alone, but it was made to Clark or his assignees, who stand in the same situation in respect of the lien which he had against Hallowell.

The Court were about to pronounce judgment, when

F. Pollock in reply, suggested, that Clark never had any lien in this case, because, by the provisions of the 47 G. 3, c. 68, coals must be sold while in the ship, except in the case of a sale to government; the property, therefore, immediately passes from the vendor to the vendee, and the factor, therefore, never had a possession, so as to give him a lien.

* *BAYLEY, J.* I am of opinion that the plaintiff is not entitled to recover. The stat. 47 G. 3, c. 68, sess. 2, was framed with the view, that coals which reached the market should not be warehoused for the

* *Abbott, C. J.*, was sitting at the Old Bailey.

benefit of the original sender of the coals, but that he should sell as soon as the ship arrived, or that the coals should be kept in the ship, and the ship thereby detained till an actual sale took place. The legislature did not intend, by the provisions of that statute, to interfere with the rights of a factor. In this case, Clark is described as the factor of Hallowell. It seems to me, that when the coals arrived, the ship having been addressed to Clark as factor, and he having the complete control of the coals in that character, the ship is to be considered as the warehouse of Clark, for the coals then in the ship, and the coals are to be considered in his possession. If that be so, then the question is, whether that which has passed between the assignees of Clark and Granger, takes away from Hallowell the right to sue in Hudson's name; and it seems to me that it does. Clark, as factor, had a lien on every thing in his possession, and he therefore had a lien upon these coals. As factor, too, he had a general lien, not only on the article when in his possession, but on the price of the article when sold, and having that lien, he may enforce payment to himself in opposition to the principal. That being so, Clark in this case sells to Granger the goods of Hallowell, who at that time was indebted to Clark in more than the price of these goods. The latter having a lien on the price, might insist that Granger should pay him, and that Hallowell should not receive the money. Clark afterwards becomes bankrupt, and his bankruptcy undoubtedly would have operated as a countermand of his authority, to receive the price on account of his principal; but it does not operate to destroy his right to receive it on his own account in respect of his lien. That being the situation of the parties, the defendant afterwards comes to a settlement with the assignees of Clark, the effect of which was, that Granger paid to Clark's assignees the price of the coals, which Clark till his bankruptcy had a right to insist should be paid to him, and which his assignees had the same right to insist upon afterwards. It seems to me, therefore, that this was a valid payment as against Hallowell, and that he cannot now, either in the name of Hudson, or in his own name, sue for payment a second time. Upon the other question, whether the action can be maintained in the name of Hudson, he having no interest in the contract, I entertain considerable doubt. If the defendant be bound to admit, that the contract was made by him with Hudson, then the latter would be the party entitled to sue. Now as Hudson's name was in the contract, and the defendant might have seen it, if he pleased, I incline to think that he is bound by the terms of the contract, and that he is not at liberty now to say, that Hudson was not the party with whom he contracted. It is unnecessary to pronounce any judgment upon that point, inasmuch as I am clearly of opinion upon the other ground, that there must be judgment of nonsuit.

HOLROYD, J. It is unnecessary to decide in the present case, whether the action can be maintained in the name of Hudson; because I am clearly of opinion upon the other point, that there must be judgment of nonsuit. It appears to me, that Clark was factor, and not a mere broker; and that being so, I am of opinion, that he had a lien not only on the goods while they remained in his possession, but also on the

proceeds of the goods which he sold as such factor. In *Drinewater v. Goodwin*, Cowper, 251, it was expressly decided, that a factor who becomes surety for a principal, has a lien on the price of the goods sold by him for his principal, in the amount of the sum for which he has become surety, and Mr. Justice CHAMBRE, in *Houghton and Others v. Matthews*, 3 Bos. & Pul. 489, considers that as settled law. Clark, therefore, having a lien on the proceeds, had a right to receive the price from the buyer, and when he had so received it, to retain it as against Hallowell. The bankruptcy of Clark could not operate to destroy his right of lien, though it would operate as a revocation of his authority to receive any money on account of his principal. His assignees after the bankruptcy, had the same rights as the bankrupt had before. A payment made to Clark before his bankruptcy, even against the will of Hallowell, would have operated as a valid payment as against Hallowell, and a payment to his assignees afterwards must have the same effect. For these reasons, I am of opinion, that the settlement between Clark's assignees and the defendant operated as a valid payment, and, consequently, that this action cannot be maintained.

BEST, J. I am of the same opinion. This action is brought in the name of the present plaintiff for the benefit of Hallowell, and it must be therefore considered as if it were brought by the latter. Now the facts are these: Hallowell sells the coals to Granger, by the means of Clark, his factor; Hallowell being then indebted to Clark beyond the price of the coals, Granger pays the money to Clark. Now, Clark as factor, having a lien on the coals, and on the proceeds when received, had a right to require that the money should be paid to him, and not to his principal, and he also had a right even to retain the money against his principal. The payment to Clark, or to his assignees, who stand in his place, was therefore a valid payment as against Hallowell, and is a good answer to the present action. It is unnecessary to decide, therefore, whether this action should be maintained in the name of Hudson, inasmuch as I am clearly of opinion, that upon the other point, there must be judgment of nonsuit.

Judgment of nonsuit.

RICHARD EATON, CHARLES HAMMOND and CHARLES HAMMOND, Jun., Plaintiffs; and HENRY BELL, CHARLES WEDGE, and JOSEPH TRESLOVE, Defendants.—p. 34.

An inclosure act empowered the commissioners to make a rate to defray the expenses of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners. Expenses were incurred in the execution of the act before any rate was made. To defray these expenses the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned on account of the public drainage, and to place the same to their account as commissioners. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts: *Held*, that the commissioners were personally responsible to the bankers for the drafts so made.

The latter having from time to time made half-yearly rests in the account, and charged inter-

est upon the balance then struck, and the commissioners having assented to that mode of keeping the accounts, it was held, that this mode of charging of interest half-yearly was not unlawful on the ground of usury.

ASSUMPSIT for money had and received, &c., and for interest. Plea, general issue. At the trial before DALLAS, C. J., at the Cambridge Summer assizes, 1819, a verdict was found for the plaintiffs. On a motion for a new trial on the part of the defendants, and on a motion on the part of the plaintiffs to have the compound interest added to the verdict, the Court directed a case to be stated.

A private inclosure act, for allotting lands in the parish of Fordham, was passed in the 49 G. 3, by which the defendants were appointed commissioners. This act provides "That the acts of two commissioners shall be as valid as if done by all. That new commissioners shall be appointed in case any of the first appointed commissioners should die. That the expenses of passing and executing the act shall be paid by the proprietors in such shares and proportions as the commissioners shall direct. That the commissioners shall make a rate, and in case of non-payment, shall have power to levy the same, together with interest, by distress. That persons advancing money for defraying the expenses shall be repaid the same, with 5 per cent. interest, out of the first moneys that shall be raised by the commissioners." Mr. Weatherby was appointed auditor of the commissioners' accounts, which were to be examined and balanced by him at least once in every year, and no charge was to be binding or valid in law unless the same was duly allowed by him.

The plaintiffs were bankers at Newmarket. On the 1st of July, 1809, the defendants held their first meeting under the act, at which the plaintiffs were duly appointed bankers. They accepted the appointment, and acted as such. Various expenses were incurred in the execution of the act before any rate was made upon the proprietors, such as making the new roads and drains. The defendants commenced drawing upon the plaintiffs in October, 1809, to defray these and other expenses, and between that time and June, 1812, the plaintiffs had advanced 3329*l.* 18*s.*, without having received any money from the defendants. On the 5th of June, 1812, the defendants made a rate upon the proprietors to the amount of 84*16l.* 18*s.* 5*d.*, and in November, 1817, another rate, to the amount of 3845*l.* 8*s.* 4*d.*, a very considerable part of which sums remained unpaid. The account continued open until December, 1818, when a balance of 2240*l.* 14*s.* 10*d.*, including compound interest, as hereinafter-mentioned, was due to the plaintiffs. During the whole of the time the plaintiffs were greatly in advance to the defendants. No interest was charged by the plaintiffs until December, 1811, when 145*l.* 8*s.*, the simple interest then due upon all the sums previously advanced, was added to the debt, and from January, 1814, half-yearly rests were made in the account, and the interest added to the principal sum advanced. The defendants generally held their meetings at Newmarket, where the plaintiffs reside; and the defendants by themselves, their clerk, or solicitor, were in the habit of taking their banking-book to the plaintiffs to have the accounts made up: each of the defendants did so from time to time, and no objection was ever made:

by the defendants to the charges for compound interest. It was the general practice of the plaintiffs to make such half-yearly rests. Mr. Weatherby, the auditor named in the private act, was not applied to by the defendants to audit their accounts until December, 1818, when the account for the balance of which this action was brought, was submitted to, and allowed by him. The drafts were in the following form: "Fordham Inclosure, October 15th, 1810. Messrs. Eaton, Hammond, and Son, pay John Morgan, or bearer, forty pounds, on account of the public drainage, and place the same to our account, as commissioners of the above inclosure." At the trial, the Chief Justice stated to the jury, that the question for them to determine was, whether credit was given by the plaintiffs to the defendants personally, or to the fund which they had power to raise. The jury found a verdict for the plaintiffs, damages 1957*l.* 15*s.*, deducting 282*l.*, the sum charged for compound interest, with leave for the plaintiffs to move to add that sum to the verdict, if they were by law entitled to recover it.

Dover for the plaintiffs. The commissioners are personally liable. They employed the defendants as their bankers. They borrowed the money, and had the means of paying it out of the rates which the act of parliament authorized them to raise. In *Horsley v. Bell*, 1 Brown, Ch. Ca., 101, Ambler, 770, a bill having been filed by the plaintiff, the undertaker of a navigation at Thirsk, in Yorkshire, against the commissioners named in the act for carrying it on, who had signed the several orders; it was contended, first, that the defendants were not personally liable, because they were exercising a public trust, and the credit was given to the undertaking itself, and not personally to them, and the remedy was, therefore, in rem; secondly, that those who had been present at the meetings, and had signed some, but not all the orders, were liable only to those to which they had respectively signed. But Lord Chancellor THURLOW, assisted by ASHHURST and GOULD, Justices, held, first, that the commissioners were personally liable; and, secondly, that they were all liable in respect of all the orders. Lord THURLOW says: "Who would make a contract on the credit of toll, which it is in the power of the commissioners to raise or not at their pleasure? Then, upon whose credit must the contract be? Certainly that of the commissioners who act. It is their fault if they enter into contracts when they have not money to answer them. They have made themselves liable by their own acts." That case is an authority to show, first, that the commissioners are personally liable; and, secondly, that they are all liable for the orders given by the others. The defendants are liable to pay the compound interest charged in the account. It is clear that they assented to this mode of keeping the accounts; and, therefore, they must be liable, unless it be unlawful. Now, in *Bruce v. Hunter*, 3 Camp. 467, it was held, that an agent who had advanced moneys for his principal, in effecting insurances and other mercantile business, was entitled to charge interest, and at the end of every year to make a rest, and add the interest then due to the principal. And, in *Ex parte Bevan*, 9 Ves., jun., it was held by Lord ELDON, that although a contract a priori for a loan for twelve months, settling the balance at the end of six months, and that the interest should carry

interest for the subsequent six months, would be bad as a contract for more than five per cent. per annum interest; yet, if at the end of the six months the parties agree to settle the accounts, and strike the balance, (that not being part of the prior contract,) and to forbear the whole balance for the next six months, that practice is legal. That case is an authority to show, that the mode of charging interest by making a rest at every six months, is not unlawful; and, consequently, plaintiffs in this case are entitled to recover the compound interest charged in the account.

Robinson, contra. In *Horsley v. Bell*, the commissioners had a power to defray their expenses; and the Court held, that persons employed by them, might reasonably look to such money as a fund, and that it was the fault of the commissioners if they contracted engagements before they had the means of defraying them. Workmen could not be expected to give credit to the undertaking. But all these grounds for that decision fail here. The commissioners acted in furtherance of the very object of the legislature in borrowing this money, and the act expressly provides for the repayment of moneys so advanced "out of the first moneys that shall be raised by the commissioners." It would be a mockery to say to them, you shall not borrow, till you have the means of repaying; for then, why should they borrow? The plaintiffs were appointed bankers by the proprietors, not the commissioners. They acted under the act. They must be taken to know its provisions. They advanced the money under the power given, and their own contract must be taken to be, that they were to be repaid out of the first moneys. They were so repaid in part. They will be paid the remainder; but they cannot sue the commissioners in their personal character. It would otherwise be extremely unjust, for then the action would lie against the survivors, and the executors of the survivor of the old commissioners; and, in the meanwhile, the new commissioners would possess themselves of the effects. This could not be the intention of the parties. The plaintiffs knew that the commissioners were not to pay out of their own pocket; and that brings the case within *Macbeath v. Haldimand*, 1 T. R. 172; *Unwin v. Woolseley*, T. R. 674; *Rice v. Chute*, 1 East, 579. As to the legality of making half-yearly rests, the modern cases certainly seem to sanction what looks like an infringement of the rule, that compound interest shall not be taken; but, here is no express admission of the correctness of the accounts.

ABBOTT, C. J. Upon principle, as well as upon the authority of the case of *Horsley v. Bell*, 1 Brown, Ch. Ca. 101; Anbler, 707, I am clearly of opinion, that the commissioners in this case were personally liable, that the question was properly submitted to the jury by the learned Judge, and that they have drawn a right conclusion. As to the question of compound interest, it is now settled, that a party advancing money to another is entitled to charge interest, and at the end of every year, then to add the principal to the interest. In *Ex parte Bevan*, 9 Ves, jun. 223, it was expressly held, that although an antecedent contract for a loan for twelve months, to settle the balance at the end of six months, and that the interest should carry interest for the subsequent six months, would be bad; yet, that an agreement at the end of six

months to settle accounts, (that not being part of the prior contract,) and then a stipulation to forbear the balance then struck for those six months, is legal. It is clear from the facts stated, that the defendants assented to that mode of keeping the accounts, and the bankers who advanced the money might have done it on the faith that they should have been permitted to convert the interest from time to time into capital; and that they would not otherwise have continued to make the advances. I think, that upon the authority of the case cited, the plaintiffs are entitled to recover the interest charged, and consequently, that the verdict must be entered for the larger sum.

BAYLEY, J. I am of the same opinion. The form of the draft is to pay A. B. or bearer on account of the public drainage. The persons, therefore, who signed that order, assert that the money is to be applied to the purpose of the public drainage. The draft then goes on, "and place the same to our account as commissioners of the inclosure act." Therefore, the money is to be placed to their debit in the account, which they have *as* commissioners. It does not say, "place the same to the account of the inclosure," but "to our account *as* commissioners."* Now, the defendants must have known what they had collected, and what means they had of collecting more; and they ought to have taken care before they drew drafts, that they had money to reimburse the persons who advanced money on those drafts. I think, therefore, that there must be judgment for the plaintiffs.

BEST, J.† concurred.

Judgment for the plaintiffs.

* See *Burrell v. Jones*, 3 Barn. & Ald. 47.

† Holroyd, J., was at Chambers.

VANSANDAU v. BURT.—p. 42.

Declaration stated, that in consideration that plaintiff would assign to defendant a bill of exchange, defendant undertook, &c.; and then averred that plaintiff did assign the bill. It appeared that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff by deed assigned to the defendant the bill, and all sums of money due thereon, to and for the defendant's own use: and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill: *Held*, that the declaration imported that the plaintiff had made an absolute assignment of the bill, and consequently, that the assignment in evidence being only conditional, this was a fatal variance.

DECLARATION stated, that in consideration that plaintiff would assign to defendant a bill of exchange for 692*l.*, dated 24th April, 1815, accepted by Jackson, Goodchild & Co., payable to the order of J. C., 70 days after date, defendant undertook, &c. Averment, that plaintiff did assign the said bill of exchange to the defendant, &c. The bill mentioned in the declaration had been formerly assigned by the defendant to the plaintiff in part payment of a debt, and the acceptors had

since become bankrupt. Under these circumstances it was agreed between the plaintiff and defendant, that the former should give up to the defendant the bill in question, the latter requiring it for the purposes of some arbitration; but that the defendant should pay to the plaintiff, from time to time, such sums of money as should be equal to the dividends upon the sum of 692*l.*, which might become payable under the estate of the drawers, acceptors, or endorsers of the bill. In pursuance of this parol agreement, a deed was executed between the parties, which, among other things, recited, that the defendant had requested the plaintiff to re-assign the said bill of 692*l.* to the defendant, which plaintiff had agreed to do upon the covenants in the indenture contained, and it was thereby witnessed, that in pursuance of said recited agreement, plaintiff *did assign* to the defendant all the said bill of exchange, and all sums of money due thereon, to and for the defendant's own use and benefit; and the defendant covenanted with plaintiff, that within seven days after every dividend which should be declared under the estate of the drawers, acceptors, payees, or endorsers of the said bill thereby assigned, the defendant would pay to plaintiff such sum of money as should be equal in amount to the dividend so to be declared on or in respect of the sum of 692*l.* 11*s.* without any deduction or abatement.

The Court now directed *Manning* to confine his attention to the point, whether there was any proof of the averment in the declaration, that the plaintiff had assigned the bill to the defendant. He now argued that there was evidence of an actual assignment of the legal property in the bill to the defendant, although the latter was bound by the terms of his agreement to pay to the plaintiff a sum equal to the amount of the dividends he might have received. Here the covenants in the deed of assignment do not amount to a condition, but are mere collateral and independent covenants.

ABBOTT, C. J. The declaration states, that in consideration that the plaintiff would assign to the defendant a bill of exchange, the defendant promised to do a certain act therein mentioned. It is then averred that the plaintiff did assign the bill to the defendant. It was therefore incumbent on the plaintiff to prove that he did so assign the bill. Now, any lawyer reading that allegation in this declaration would understand that the plaintiff was to assign the bill without any qualification, and for the sole benefit of the assignee. It appears, however, upon the facts stated in the case, that there was no assignment, but that the bill was merely given up to the defendant, who wanted it for a particular purpose, upon condition that the proceeds should from time to time be paid to the plaintiff. That is by no means the unqualified assignment which the declaration imports. If the declaration had stated as the consideration that the plaintiff had assigned to the defendant the legal interest in the bill, subject to a condition, that he was to pay the plaintiff the proceeds, the facts proved would have supported that averment. I am of opinion that here there was not any evidence of such an assignment; and, therefore, there must be judgment for the defendant.

BAYLEY, J. The language used in this declaration imports the agree-

ment to have been that the plaintiff should execute an unqualified and unconditional assignment. The real bargain, however, between the parties was, that he should execute an assignment, accompanied with this condition, that if the defendant should receive any dividends upon the bill, he should pay the same over to the plaintiff. That is a qualified assignment, and is so described in the indenture which the parties themselves executed in pursuance of their agreement. It appears to me, therefore, that the consideration was untruly stated, and that a nonsuit ought to be entered.

BEST, J.* The declaration alleges the consideration to be, that the plaintiff shall make an unconditional assignment of the bill of exchange to the defendant, by which it must be understood that the assignee of the bill was to have the whole benefit of it; whereas it appears, in point of fact, that he was to derive no benefit, for he was to hand over the whole proceeds to the plaintiff. There is, therefore, a material variance in the consideration stated in the declaration and that given in evidence; and that being so, there must be judgment for the defendant.

Judgment for defendant.

* Holroyd, J., was at Chambers.

SOLLY and Another v. WHITMORE.—p. 45.

By a policy a ship was insured at and from Hull to her port, or ports, of loading in the Baltic sea and Gulf of Finland, with liberty to proceed to, and touch and stay at, any port or ports whatsoever, for any purpose, particularly at Elsinore, without being deemed a deviation. The ship touched and stayed at Elsinore and Dantzic, to deliver goods, Pillau being her port of loading: *Held*, that this was a deviation.

ASSUMPSIT of a policy of insurance upon the ship Seemann. At the trial before BAYLEY, J., at the London sittings after Trinity term, 1820, a verdict was found for the plaintiffs, subject to the opinion of the Court, on the following case:

On the 29th September, 1818, the defendant subscribed a policy of insurance upon the ship Seemann, and the risk was, "at and from Hull, to her port or ports of loading in the Baltic sea and Gulf of Finland, with liberty for the ship in the said voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever and where soever, for all purposes, particularly at Elsinore, without being deemed a deviation." The policy was effected by the plaintiffs, on behalf of James Phillips, who then resided at Konigsburg, in Prussia, and was the party interested in the insurance as owner of the ship. The ship, on the 3d October, 1818, began loading on board at Hull, sundry packages for Elsinore, sundry other packages for Dantzic, and sundry other packages for Pillau, and on the 23d October, in the same year, set sail from Hull on her voyage for Elsinore, Dantzic, and Pillau, the latter being her intended port of loading. The ship touched at Elsinore, and landed there the goods destined for that place; she afterwards sailed for Dantzic, and arrived there on the 15th December, 1818, and was delivering the goods destined for Dantzic, until the 19th December, 1818, when she proceeded to Pillau to deliver the remainder of her cargo. On the 21st December, 1818, the ship, when in sight of

Pillau, was totally lost by the perils of the sea. The premium mentioned in the policy was returned by the defendant to the plaintiffs before the commencement of the present action.

F. Pollock, for the plaintiffs, admitted, that it was now settled by the cases of *Rucker v. Allnutt*, 15 East, 278; *Langhorn v. Allnutt*, 4 Taunt, 519; and *Hammond v. Reid*, 4 B. & A. 73, that the liberty to touch at any port or place whatsoever for all purposes, must be taken to mean, for some purpose connected with the voyage. Here, *the object of the voyage was*, that the ship was to proceed from Hull to her port of loading in the Baltic. But it does not therefore follow, that she was to sail in ballast, and if she was to take goods, she might be permitted to deliver them at those ports, where, by the liberty reserved in the policy, she was permitted to touch and stay.

C. Puller, contra, was stopped by the Court.

ABBOTT, C. J. The liberty given by this policy to touch at any ports for all purposes, must be construed to mean purposes connected with the voyage. Here, the voyage was from Hull to a loading port in the Baltic, and if the ship had gone to Elsinore or Dantzic to see if she could get a cargo, that would have been a purpose connected with the voyage, and consequently would not have been a deviation. But the vessel, in fact, went to those ports for the purpose of delivering goods, which was wholly unconnected with the object of the voyage insured. I am therefore of opinion, that this was a deviation, and consequently, that there must be judgment of nonsuit.

Judgment of nonsuit.

ELLIS v. ARNISON.—p. 47.

By an inclosure act it was enacted, that the commissioners should set out, allot, and award certain portions of lands out of the commons to be inclosed, unto the impropriate rectors and curate, in lieu of all great and vicarial tithes; and the commissioners were required to distinguish by their award the several allotments to the impropriate rectors and curate respectively, and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes: *Held*, under this act, that the tithes were not extinguished until the commissioners made their award.

DECLARATION stated, that by an indenture, made 10th February, 1804, between the plaintiff of the one part, and the defendant and one John Campbell of the other part, the plaintiff demised unto the defendant and the said John Campbell, all the small or vicarial tithes and dues of what nature soever, yearly arising in respect of a certain piece or parcel of ground, situate in the parish of East Moulsey, in the county of Surrey, and all other the tithes belonging to him the plaintiff, as the incumbent of the living of the parish of East Moulsey, for and in respect of the said ground and premises. Habendum for twenty-one years, yielding and paying a yearly rent of 22*l*. Covenant to pay the rent. Breach, non-payment of rent for one year, ending at Michaelmas, 1818. Plea, that after making the indenture, and before the com-

mencement of the time for which the alleged rent is supposed to have arisen by an act of the 55 G. 3, for enclosing lands in the parishes of East Moulsey and West Moulsey, in the county of Surrey, reciting, amongst other things, that there were in those parishes several commons and waste lands; and that Lord Hotham and Sir G. H. F. Berkeley were seised of the rectory impropriate of East Moulsey, and, as such, were entitled to all the rectorial tithes within the parish; and that the provost and fellows of King's College, Cambridge, were the patrons of the perpetual curacy of the parish of East Moulsey, and that the Rev. W. Ellis was the curate thereof, and, as such, was entitled to all the small tithes within the parish: it was enacted, that A. B. D. and J. D. should be appointed the commissioners for setting out, dividing, and allotting the commons and waste lands within the parishes of East and West Moulsey, and for putting the act into execution; and, it was also further enacted, that the commissioners should set out, allot, and award unto the impropriate rectors and curate of the parish of East Moulsey, in lieu of all great and small tithes arising out of any part of the said commons and waste and other lands in the said parish, thereby intended to be divided, allotted, and enclosed, and for and in lieu of the tithes of all such gardens, orchards, pastures, woodlands, and other ancient enclosures in the parish, as were liable to the payment of tithes; and in lieu of such moduses, and all payments and compositions in lieu of such tithes, such several plots, parcels, and allotments of the said commons, or waste, or other lands, as in the judgment of the commissioners should be in the whole equal in value to one-fifth part of all the land which was then arable, or which had been arable within seven years before the passing of the act; one-tenth part of all the woodlands, and two-seventeenth parts of all the other lands and grounds within the parish, which were liable to the payment of tithes; and the commissioners were required to distinguish and separate by their award the several allotments so to be made by them to the impropriate rectors and curate respectively; and the same allotments were thereby declared to be in full satisfaction and discharge of and for the said tithes and moduses, and all payments and compositions in lieu of tithes, if any, yearly issuing from or out of the said commons, waste, or other lands. The plea then stated, that the premises in the declaration mentioned were within the parish of East Moulsey, and were liable to the payment of tithes; and that, after making the said act, and before the 29th September, 1818, to wit, on the 27th September, 1816, the commissioners did set out and allot unto the impropriate rector and curate of the said parish of East Moulsey, in lieu of all great and small tithes issuing out of the said commons, and waste, and other lands in the said parish of East Moulsey, by the said act intended to be divided, allotted, and enclosed, and for and in lieu of the tithes of all such gardens, orchards, pastures, woodlands, and other ancient enclosures in the aforesaid parish, as were liable to the payment of tithes; and in lieu of all moduses, and all payments and compositions in lieu of such tithes, certain plots, parcels, and allotments of the said commons, and waste, and other lands, as in the judgement of the commissioners were in the whole of the value mentioned and prescribed in the act, and

which allotments were to be in full satisfaction and discharge of and for the said tithes and moduses, and all payments and compositions in lieu of tithes (if any), yearly issuing out of the said commons, waste, and other lands. The plea then stated, that by means of the premises all the small and vicarial tithes and dues, yearly arising in respect of the said land and premises in the said declaration mentioned, ceased and determined, and were from thenceforth forever extinguished, and are no longer payable for and in respect of the said ground and premises; and, that all the rent, up to the time of the extinguishment, was paid by the defendant. Replication, after setting out other clauses of the act, stated that the commissioners had made no award. Demurrer and joinder.

D. F. Jones, in support of the demurrer. The question is, whether the tithes have not been extinguished by the allotment made by the commissioners under the act. That depends entirely on the construction of the act. The first part is directory to the commissioners, to set out, allot, and award lands in lieu of tithes; but the act expressly enacts, that the allotments are to be in lieu of tithes. Now the plea shows, that an allotment has been made, and, consequently, that the clergyman has received his compensation for his tithes, which are, therefore, extinguished. It is clear, that the act intended the clergyman to take a benefit before the formal completion of the award, and the fair construction of the act is that the inception of the perpetual curate's advantages under the enclosure, and the extinguishment of the tithes, in lieu of which those advantages were given to him, should be contemporaneous. Under all enclosure acts, certain powers of occupation and of exercise of ownership are given, antecedently to the award to the persons to whom the allotments are made, and a variety of collateral arrangements are to be made, before the award can be perfected. The section of the act, on which the present question turns, must be taken to be framed with reference to this view of the subject, the first clause of the section is directory that the commissioners shall set out, allot, and award; but the subsequent clause, extinguishing the tithes, enacts, that the allotments shall be in full satisfaction and discharge, omitting the repetition of the term "award." Therefore, though the commissioners are bound to set out, allot, and award, yet, inasmuch as the setting out and allotting conferred rights on the clergyman before the execution of the award, the extinguishment of tithes was intended to take effect upon the allotment, without waiting for the lapse of time, and the investigation and adjustment of other matters, that were necessarily to precede the formal execution of the instrument by the commissioners.

J. Parke, contra, was stopped by the Court.

BAYLEY, J.* I am of opinion that the plea cannot be supported. The question is, whether it appears upon the face of the pleadings, that the tithes have been extinguished by what has been done. By this private act, the commissioners are required to set out, allot, and award, to the impropriate rectors and curate, in lieu of all great and small

* Abbott, C. J., was sitting at the Old Bailey.

tithes, certain plots, parcels, and allotments of the commons, &c.; and, they are required to distinguish and separate the several allotments so to be made by them, to the impropriate rectors and curate respectively, and the same allotments are thereby declared to be in full discharge of all tithes. Now, the compensation to the proprietor of the tithes is "the same allotments," viz.: the allotments set out, allotted, and awarded. That seems to me to be the plain meaning of the act of parliament; and this construction is fortified by adverting to what the general rule of law is upon this point, with reference to new enclosures. Now, the freehold in the allotment does not vest in the person to whom the allotment is made before the award is executed; that point was so decided in the case of *Farrar v. Billing*, 2 Barn. & Ald. 171. Now, this plea states only, that the lands had been set out and allotted. It, therefore, does not show that the tithe was extinguished, because, for that purpose, the allotments ought to have been awarded as well as allotted and set out. I think, therefore, there must be judgment for the plaintiff.

HOLROYD, J. I am entirely of the same opinion. The thing which the act of parliament directs to be in lieu of tithes, is the ground which shall be set out, allotted, and awarded by the commissioners. The question is, in this case, whether, by what has been done, the plaintiff has got that which, by the act of parliament, he was to have in lieu of tithes. It appears upon the plea, that a piece of ground has been set out and allotted, but not awarded, and, therefore, the plaintiff has not got that which was to be in lieu of his tithes. The subsequent part of the clause enacts, that the same allotments (which word, by reference to the preceding words, must be taken to mean, the lands set out, allotted, and awarded) are to be in full satisfaction and discharge of the tithe. Now, the commissioners have made no award; and, therefore, the plaintiff has not got that which the latter part of the clause directs to be in full satisfaction of the tithe. I think, therefore, there must be judgment for the plaintiff.

BEST, J. It would be a very hard thing on the curate of this parish, that he should be bound to give up his tithe before he has got the equivalent. Now, he has not any equivalent till the award be made. After the allotment is made, any party interested in the lands to be allotted, may appeal to the sessions, and the allotments may then be altered before the final award is made. It would be most unjust, therefore, that an allotment, which is not a final adjudication, should be that which the curate is to have in lieu of tithes. I think that the words, same allotments, must be construed with reference to the preceding words; and, therefore, that they must mean an allotment, confirmed by an award. It does not appear, in this case, that any award has been made; and, therefore, the plaintiff is entitled to our judgment.

Judgment for plaintiff.

GARNETT and Another v. WILLAN and JONES.—p. 53.

A parcel which, with its contents, exceeded 5*l.* in value, having been delivered to A. and B., common carriers, to be carried by their mail-coach, was accepted by them to be so carried, and was actually put into the mail, and carried by that conveyance a short distance; it was then taken out of the mail-coach by a servant of the carriers, and left to be forwarded by another coach, of which A. was one of the proprietors, but in which B. had no concern, and the parcel was lost. The carriers had previously given notice that they would not be responsible for any package containing specified articles, or which, with its contents, should exceed 5*l.* in value, if lost or damaged, unless an insurance were paid: *Held*, that, notwithstanding this notice, the carriers were responsible for the parcel in question, in consequence of their having delivered it to be carried by another coach, of which one of the carriers only was proprietor.

THIS was an action on the case, brought by the plaintiffs against the defendants as common carriers, for hire from London to Worcester, to recover the value of a parcel delivered to the defendants, to be carried by them from London to Worcester, and alleged to have been lost. Plea not guilty. The cause was tried at the London sittings after Trinity term, 1820, before BAYLEY, J., when the jury found a verdict for the plaintiffs, subject to the opinion of the Court on the following case:

The defendants, at the time of the delivery to them of the parcel, were the proprietors of the Worcester mail-coach, used by them as common carriers, for the carriage of passengers and goods for hire. The plaintiffs, who resided at Worcester, wrote on the 17th September, 1819, to their correspondents in London, desiring to have two pieces of sarsenet sent to them "by the return of mail." Such sarsenet, of the value of 45*l.* 0*s.* 5*d.* was accordingly packed up on the 18th September, 1819, and duly booked at the coach office, at the Bull and Mouth inn, from which the Worcester mail proceeds, "as for the Worcester mail-coach to Worcester." The parcel was accordingly, by the defendants, put into the Worcester mail-coach at the Bull and Mouth inn, and entered in the usual way-bill of that coach, as a parcel to be carried thereby from London to Worcester, and the same parcel was carried in the mail-coach, from the coach-office at the Bull and Mouth inn, to a place called the Green Man and Still, in Oxford street, at which the defendants have no office or servant, but where passengers and parcels are booked for the defendants' mail-coach, and there the same was taken out of the mail-coach, and left at the Green Man and Still, to be forwarded on the following day to Worcester by another Worcester coach, called the heavy coach, (in which the defendant, John Jones, had no interest,) and the entry in the way-bill of the mail-coach was altered accordingly. The parcel was afterwards lost out of the heavy coach, but it did not appear by what means. Before the parcel was so booked, and delivered to be carried to Worcester, by the mail, the defendants had caused the following public notice to be given, and the plaintiffs had notice thereof. "Take notice, that the proprietors of the public carriages, who transact their business at this office, will not be answerable for any package containing cash, bank notes, bills, jewels, plate, watches, lace, silks, or muslins, however small the value, nor for any other package which, with its contents, shall exceed 5*l.* in value,

if lost or damaged, unless the value be specified, and an insurance be paid over and above the common carriage, when delivered here, or to any of their offices or agents in the different parts of the kingdom."

Chitty was to have argued for the plaintiffs, but the Court called upon *F. Pollock*, contra. The defendant is exempt from all responsibility for this loss, by the express terms of his notice, for the parcel has been lost. The object of these notices is, to protect the carrier from all losses arising from the default of his servants, unless the goods be insured. It is not unreasonable, that, with respect to parcels of value, carriers should require an additional compensation in proportion to the risk they run, and there can be no doubt, that, by the law of England, carriers may by such notices limit their responsibility. In *Nicholson v. Willan*, 5 East, 507, a parcel above the specified value of 5*l.* was delivered by the carrier, to be carried by the mail. The proprietors in that case were proprietors both of a mail and a heavy coach, going the same road from Nottingham to London; the parcel was accepted by them to be carried by the mail. It was, however, booked for the heavy coach, and afterwards lost, but it did not appear whether it was lost in a course of conveyance by the coach, or out of the warehouse. It was there held, that the parcel was to be considered as a parcel *lost or damaged* within the meaning of those words in the notice, and that the carrier, therefore, was exempt from responsibility. That case is an authority expressly in point to show, that the present defendants are not liable.

BAYLEY, J.* I am of opinion that the plaintiffs are entitled to recover. A carrier is entitled to have a compensation in proportion to the value of the article entrusted to his care, and the consequent risk which he runs. He may, therefore, by a special notice, limit his responsibility to a reasonable extent. The notice given in this case was, that the carrier would not be answerable for parcels containing certain specified articles, nor of any parcel above the value of 5*l.* if lost or damaged, unless an insurance were paid. The question then is, what is the fair meaning of the words "lost or damaged." In their largest sense, they would comprehend any case where the goods were lost or damaged by the wilful act of the carrier, or of his servant, even if he threw away the parcel entrusted to his care. For, in that case, it certainly might be said to be lost. It seems to me, however, that that is not the fair and reasonable construction of those words in this notice. Such a construction would certainly be wholly inconsistent with several decided cases, to which I shall presently refer. The true construction of the notice seems to me to be this, that the carrier is not to be protected by the words lost or damaged, if he divests himself wilfully of the charge of the parcel entrusted to his care; because, he thereby divests himself of his character of carrier of the thing entrusted to his care. The words lost or damaged ought to be qualified thus: "the carrier himself doing nothing by his own voluntary act, or the act of his servants, to divest himself of the charge of carrying the goods to the ultimate place of destination." It has been said, that the

*Abbott, C. J., was the *Old Bailey*.

object of this notice was, to exempt the carrier from all responsibility for the acts of his servants. That, however, is not the object expressed in the notice, and it has been held in many cases, that a carrier is responsible for the want of care and diligence of his servants. In *Smith v. Horne*, 2 B. Moore, 18, a parcel having been sent from Worcester to London, arrived in London, and was taken from the coach-office of the defendant in a cart, under the direction of *one* person only, for the purpose of delivery; the servant left the cart unprotected in the street, while he went to different houses for the purpose of delivering other packages, and the parcel, the subject of the action, was lost out of the cart. The Court were of opinion, that the carrier, notwithstanding his notice, was liable, and that the words lost or damaged did not apply to a case of that description. In that case, the carrier, by leaving the cart in the unprotected state which he did, liable to be pillaged by any dishonest person, might be considered to have divested himself of the charge of carrying it to its ultimate place of destination, and there, too, the loss accrued from the act of the servant. In *Bodenhams v. Bennett*, 4 Price, 31, the carrier by his servant had carried the parcel beyond the place of its destination, and it was lost. The Court of Exchequer, after great consideration, were of opinion, that the carrier was not protected by the terms of the notice, upon the principle, that, at the time the loss accrued, the carrier was not carrying it to its place of destination, but, by a wrongful act of his own, had divested himself of the charge of it, on its way to the place of destination. In *Berkett v. Willan*, 2 B. & A. 356, a parcel of indigo was sent by a carrier, directed to a person at Exeter, and it was delivered by the book-keeper at the coach-office to a person who applied for it, but who had no right to receive it. In that case there was a wrongful delivery by the act of the servant. The Lord Chief Justice at the trial was of opinion, that the carrier was protected by the terms of his notice, but the Court, upon a motion for a new trial, and after argument, were of opinion, that that being a case of gross negligence, was a loss not protected by the terms "lost or damaged" in such a notice. Now in that case, the carrier by a wrongful act of his servant, had divested himself of the charge of carrying the parcel to its ultimate place of destination; for it was his duty to carry it to the house of the person for whom it was intended at Exeter, if he found the person to whom it was directed, or to keep it in order to make due inquiry to find him out. These cases are authorities to show, that the terms lost or damaged in these notices, are to be understood in a limited sense, and it seems to me, that the courts have put a sound construction upon those words *lost or damaged*, by which the carrier will receive all the protection which he ought to receive, for he will thereby be exempt from those peculiar liabilities which attach to him only in his character of carrier, but not from the consequence of his own misfeasance, for which every bailee is responsible. In this case, the defendants, Willan and Jones, received the parcel to be carried by them. Their coach arrives at the Green Man and Still, and the parcel is then, by their concurrence, put out of their possession, and delivered to a different person. Now, when the plaintiff sent his parcel by Willan and Jones, he had

a right to have the care and attention of both those persons, and when he had the care and attention of one only, he had not that care and attention for which he originally contracted. Willan and Jones have therefore, by the act of their servant, divested themselves of the charge of carrying this parcel to its ultimate place of destination; and upon that principle, I am of opinion, that they are not protected by their notice. We have been strongly pressed in argument by the case of *Nicholson v. Willan*, 5 East, 507. That case, however, is plainly distinguishable from the present. There the defendant was the owner of two coaches, a mail and a heavy coach, going to the same place, and the parcel was delivered for the purpose of being sent by the mail. It was not proved that it was in fact put into either coach, but, by an entry in the defendant's books it appeared, that he had intended to send it by the heavy coach. The parcel was lost, but whether out of the warehouse or in the course of conveyance does not appear. In that case, the carrier had not done any thing to divest himself of that parcel in his character of the proprietor of the mail-coach, and he might afterwards have sent it by the mail, notwithstanding the entry in the book. That case, therefore, cannot govern the decision of the present, and I am therefore of opinion, upon principle as well as authority, that the plaintiffs are entitled to our judgment.

HOLROYD, J. I am of opinion, upon principle as well as upon the authority of decided cases, that a carrier, notwithstanding his notice, is responsible for any loss or damage arising in the course of the trust reposed in him, either from his own personal misconduct or that of his servants. The substance of the notice in this case is, that the carrier will not be responsible in certain specified cases, if the goods be *lost or damaged*, unless they are insured. Having given this notice, the defendants receive the parcel in question, to be carried by them by a particular carriage. It is so entered by them in their book, and is taken a part of the way, and is then delivered over by one of their servants to be carried by another conveyance. It must, therefore, be taken to have been delivered over by them with the knowledge that it was to go by the mail from which it was removed, for the way-bill was altered after the parcel had been put into a course to go by that coach. The words "*if lost or damaged*," in my opinion, apply only to a loss or damage arising from any negligence or misconduct in the carriage of the goods. Here the loss arose from a wrongful act of the defendants, wholly inconsistent with the contract they had entered into to carry the parcel, for the consequences of which they are answerable. Suppose, after having received the parcel, that, instead of carrying it, they had refused to do so, and wilfully suffered it to remain in their warehouse in town; that would clearly be a breach of the undertaking to carry it to its ultimate place of destination, and would constitute a wrongful act, for the consequences of which the defendants would be responsible. In this case they did take the parcel part of the way, and then removed it into another carriage. The action here is founded upon that misdelivery, and not upon any thing arising in the course of the carriage of the goods which they had undertaken to convey: but for doing an act quite inconsistent with that for which they

had stipulated. The delivery of it over to another coach, when they had undertaken to carry it by their own coach, was a wrongful act on their part, which makes them responsible for the consequences arising from that misdelivery. Besides the cases already referred to by my brother Bayley, the case of *Beck v. Evans*, 16 East, 247, is a strong authority to show, that a carrier, notwithstanding these notices, is responsible for the negligence of his servant. There the carrier received a cask of brandy, which leaked in the course of the journey; the wagoner was informed of it, but took no step to prevent the leakage, and a considerable quantity of the brandy was lost; and it was held that the carrier, notwithstanding his notice, was responsible, on the ground that the loss accrued from the gross negligence of the servant. So, too, in *Ellis v. Turner*, 8 T. R. 531, the goods were sent by water to be carried to Stockwith, and they were carried beyond the place, and the vessel was afterwards lost; the Court held, that the carriers, notwithstanding the notice, were responsible; and in that case the loss happened, not from the miscarriage of the goods, but from carrying them beyond the place at which they had undertaken to deliver them. As to *Nicholson v. Willan*, it is perfectly consistent with the circumstances stated in that case, that the parcel may have been lost out of the warehouse, or even that it may have been sent by the mail; and Lord ELLENBOROUGH, in delivering the judgment of the Court in that case, expressly states, "that the mere fact of the booking of the goods for a different coach, and a subsequent non-delivery, could amount to no more than a negligent discharge of their duty in their character of carriers, and not to an entire renunciation of that character, and of the duties attached to it, so as to make them guilty of a distinct tortious misfeasance in respect of the goods in question." In the present case, there was a renunciation of that character; for the putting of the parcel into another carriage, when they knew that it was to go by their own, and when they had in fact carried it part of the way, was an act done in direct contravention of the undertaking which they had entered into; and therefore was a wrongful renunciation of their character of carriers; for all the consequences of which they are, in my opinion, responsible. In the case of *Bodenham v. Bennett*, 4 Price, 34., Mr. Baron Wood, speaking of these notices, said, "These special conditions were introduced for the purpose of protecting carriers from extraordinary events; but they were not meant to protect them from due and ordinary care; besides, this case does not come within the term of the notice; for here the box was not lost or damaged, but it was mis-delivered." Now, in this case the loss arose both from the want of due and ordinary care, and from doing an act in contravention of their duty and undertaking; and besides, in this case, too, the parcel was mis-delivered, by having been delivered to another carrier. Upon these grounds, and upon the authority of the cases to which I have referred, I am of opinion that the defendants are responsible for the value of the property lost in consequence of the wrongful act of their servants, who delivered it over to another carrier to be carried by his coach, instead of that of the defendants.

BEST, J. Admitting that there is a distinction between negligence and misfeasance, I think that the plaintiffs are clearly entitled to recov-

er; because it appears to me that this is a case of misfeasance. Upon the other point I have lately said so much, that it will be only necessary for me to say, that nothing which has since occurred has induced me to alter my opinion. *Batson v. Donovan*, 4 Barn. & Ald. 21. I cannot see, with reference to the question of the responsibility of the carrier, that there is any sound distinction between negligence and misfeasance. I am of opinion, that by the common law, a carrier is answerable for the negligence, as well as the misfeasance of his servants. The case of *Nicholson v. Willan*, which has been strongly pressed in argument, for the reasons already stated, is not an authority in favour of the defendants; but if it were, I think that the authority of that case is considerably shaken by the case of *Birkett v. Willan*, where the decision of the court proceeded expressly on the ground that the carrier was liable for gross negligence. I am of opinion, that by these notices the carrier is only protected from that responsibility which belongs to him as insurer; that is a principle which all mankind can understand; and I think that we ought, in such cases as these, to lay down rules which may be easily comprehended by the great body of the public. For the reasons already given, I am of opinion that the plaintiff is entitled to recover.

Judgment for plaintiff.

DOE, on the joint and several Demises of JOHN ANNANDALE, DAVID ANNANDALE, and JAMES ANNANDALE, and THOMAS DEWELL, and FRANCES, his Wife, Plaintiffs; v. CHARLES BRAZIER, Defendant.—p. 64.

A testator, by his will, bequeathed the rents of one dwelling-house, situate in A. to C. B. for his life; and from and after the decease of the said C. B., he bequeathed the same rents, *together with* the rents of all his other houses and lands, unto his nephews and niece therein mentioned, for their lives and the life of the survivor; and after the decease of the survivor of them, he gave and devised all his houses and lands to trustees, in trust to sell the same, and to pay the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor; and then devised all the residue of his estate to C. B.: *Held*, that upon the death of the testator, the nephews and niece took an immediate estate, for their lives and the life of the survivor, in the rents of all the houses and lands, except the house specifically bequeathed to C. B. for his life.

THIS cause was tried before ABBOTT, C. J., at the Middlesex sittings after Trinity term, 1820, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the construction of the following will: "I, James Priest, of, &c., make this my last will and testament: I give and bequeath unto my son-in-law, Charles Brazier, the rents, issues, and profits of my messuage, tenement, or dwelling-house, situate in New Brentford, in the county of Middlesex, for the term of his natural life; and from and after the decease of the said Charles Brazier, I give and bequeath the same rents, issues, and profits, together with the rents, issues, and profits of all other of my messuages or tenements, lands, hereditaments, and premises, situate and being in new Brentford aforesaid, unto my three nephews, John Annandale,

James Annandale, and David Annandale, and my niece, Frances Annandale, for their respective natural lives, and the life of the longest liver of them, share and share alike, and from, and immediately after the decease of the survivor of them, my said nephews and niece, I give and devise all, and singular, my said messuages or tenements, lands, hereditaments, and premises, unto Christopher Peel and George Clark, their heirs and assigns for ever, upon trust, to sell the same premises, and to pay over the produce of such sale unto such of the children of my nephews and nieces as shall be living at the time of the decease of the survivor of them. I give and bequeath unto the said Charles Brazier 100*l.* stock in the four per cent. consols, for his own use and benefit, and I give and bequeath unto him, the said Charles Brazier, all my household goods, plate, linen, china, and all other my estate and effects whatsoever and wheresoever. To hold the same unto the said Charles Brazier, his heirs, executors, administrators, and assigns for ever." The premises for which this ejectment was brought, were the messuages, tenements, lands, hereditaments, and premises mentioned in the testator's will, situate and being in New Brentford, (save and except the house mentioned as then in the occupation of R. Tunstall,) and expressly devised to the said Charles Brazier for the term of his life, and of which the testator died seized. The defendant, Charles Brazier, is the son-in-law of the testator, and the residuary legatee and devisee mentioned in his will, and was at the time the ejectment was brought, and still is, in possession of the premises sought thereby to be recovered. The lessors of the plaintiff (the Annandales,) were the surviving nephews of the testator, and legatees mentioned in the above will. Thomas Dewell, the other lessor, intermarried with the niece. The lessors of the plaintiff were not the heirs at law of the testator.

The question for the opinion of the Court was, whether the lessors of the plaintiff were entitled under the will to the premises belonging to the testator, situate in New Brentford, during the life of the defendant.

Treslove was to have argued on the part of the plaintiff, but the Court called upon

Chitty, contra. No interest passed to the nephews and niece of the testator by his will, until after the death of Brazier. The testator, after giving one house for life to the defendant, proceeds, "and from and after the decease of C. Brazier, I give and bequeath the same rents, &c., together with the rents, &c., of my other houses, to my nephews and niece." Now it is perfectly clear, that the latter could take no interest in the one house bequeathed expressly to the defendant, until after his death, and the words, "together with" cannot be rejected from the will, and if they be allowed to stand, then they refer not merely to the bequest, but to the time when the bequest is to take effect. The will operates therefore as a specific devise of specific property, to take effect only upon the death of Brazier. That being so, and as the trustees named in the will took no estate until after the decease of the survivor of the nephews and niece, the life interest in all the testator's houses in New Brentford, passed to the defendant under the residuary clause in the will.

BAYLEY, J.* We have no right to make a will for a party, but it is our duty to look to the whole of the will, and to extract from it what, on the fair construction of the will, appears to have been the intention of the testator. And of the intention of the testator, in this instance, I have no doubt. It seems to me, that his object was to give one house to Charles Brazier, and to give the reversion of that, and the immediate possession of all his other houses, to his nephews and niece for their respective lives. If the words, "and from and after the decease of the said Charles Brazier," be confined in construction to what had before been given to Charles Brazier for life, then there is no difficulty in the construction of the will. The proper way of reading it is this, "I give to my son-in-law, Charles Brazier, that house, and after his decease, I give and bequeath the rents, issues, and profits of that house to my three nephews and niece, *together with* the rents, issues, and profits of my other houses," applying the words "together with" as a repetition of the words of gift and bequest; not meaning to postpone the interest in the other houses till after the decease of Brazier, but giving to him the immediate interest in that house. It might happen in the course of events, according to the construction contended for, that every one of those persons might be disappointed, because, if Charles Brazier survived them, they would take, (according to that construction) no interest at all in any of the houses, and their children even would take no interest until Brazier died; nor until that event happened, would the trustees be entitled to sell. Whereas they are directed to sell immediately after the death of the survivor of the nephews and niece. Such a construction, therefore, seems to be at variance with the provisions of this will. The case of *Cooke v. Gerard*, 1 Saund. 181, is an authority in point. In that case, the testator had two estates, one in possession, and another in reversion expectant on the death of A. B. He devised the former to his widow for one year, and then he devised both to the lessors of the plaintiff, to hold immediately after the expiration of the year from his decease, and the decease of A. B. Therefore, the lessor of the plaintiff was, according to the words, to hold from, and immediately after the expiration of one year after the death of the testator, and the decease of A. B. The question was, whether the whole was postponed until after A. B. died. The Court decided not, but that the words were to be taken distributively, and that "after the decease of A. B.," was only to be applied to that estate in which A. B. had an interest. And so in this case, these words, "after the decease of Charles Brazier," may fairly be confined to that house, the rents, issues, and profits of which had previously been given to Charles Brazier for his life; but as to the residue, it is a present and immediate devise.

HOLROYD, J. I think that we should defeat the manifest intention of the testator, if we were to decide this case in favour of the defendant. It seems to me, that at the very time when the testator was devising one house to C. Brazier, he had in his mind his other real property. For, immediately after giving the life estate in the one house

* Abbot, C. J., was sitting at the Old Bailey.

to the defendant, he goes on and says, and from, and immediately after the decease of the said C. Brazier, I give the said rents, issues, and profits, together with the rents, issues, and profits of my other houses, to my nephews and niece. It is clear, that the testator meant Brazier to take a life estate in one house only, and yet that he meant in this part of the will to dispose of his property in the other houses. Now, that intention of the testator cannot be effected without giving an immediate interest in the latter to his nephews and niece. It is said that the words "together with" incorporate not only the gift, but the time when that gift was to take effect. I think, however, that it was the manifest intention of the testator in this case, that these words should apply only to the gift, and not to the time when that gift was to take effect. I think it quite clear, therefore, that the testator in this part of his will intended to give an immediate estate for the lives of his nephews and niece, and the life of the survivor, and therefore, that there should be judgment for the plaintiff.

BEST, J. I am of the same opinion. It is evident that the testator did not intend, that the defendant, to whom he had expressly devised one house, should take an immediate interest in the other houses, and it is equally clear, that he did not intend these houses to go to his heirs at law, for he has, by the residuary clause, given away all his estates whatever. Then if he intended, that these houses should not go to the defendant or his heirs at law, it is quite clear, that he must have intended, that they should immediately upon his death go to his nephews and niece. It has been said, that the words "together with" must necessarily refer to the time when the gift is to take effect. Looking, however, to the whole context of this will, I think that we shall best attain the intention of the testator by construing those words to refer to the property bequeathed, and not to the time when the bequest is to take effect. I think, therefore, that there must be judgment for the plaintiff.

Judgment for the plaintiff.

**CAZENOVE and Another, Assignees of POWER and WARWICK,
Bankrupts, v. PREVOST and others.—p. 70.**

A., a foreign merchant, purchased in his own name, but on account and with the money of B., a British merchant, certain bank shares in the French funds. The latter drew bills upon A., which he accepted, on the security of those shares standing in his name; and these bills were assigned by B., for a valuable consideration, to C., a British subject. Before they became due, B. authorised A. by letter to sell the bank shares, in order to reimburse himself against the bills. Before that letter arrived, A. had stopped payment, and afterwards became bankrupt, and the bills were dishonoured; B., also, afterwards became bankrupt. C., by process in the foreign country, attached the bank shares still standing in the name of A. for the debts due to him upon the bills; and the court there decreed that the bank shares should be sold, and that the proceeds should be applied, first, to pay a debt due from B. to A., and afterwards to retire the bills. Under this decree, C. received a certain sum of money on account of the bills: *Held*, that the assignees of A. could not recover back this money as money belonging to B.

ASSUMPSIT by the plaintiffs, as assignees of the estate and effects of J. Power and R. Warwick, of London, merchants, against the defendants, who were merchants, also resident in London, to recover from them 1346*l.*, as money had and received by them, to the use of the plaintiffs, as such assignees. Plea, general issue. The cause was tried at the Middlesex sittings, before ABBOTT, C. J., when a verdict was found for the plaintiffs, subject to the opinion of the Court, on the following case.

In June, 1818, Martin de Puech and Co., of Paris, by the directions of the bankrupts, purchased in their own names, but on the bankrupts' account, 25 bank shares in the French funds, and at the same time drew two bills of exchange upon the bankrupts, for the price of such shares, which the bankrupts duly accepted and paid. On the 2d October, 1818, the bankrupts drew upon Martin de Puech and Co. three bills of exchange, amounting together to 40,000 francs, payable three months after date, which the defendants purchased of the bankrupts, and gave them the value for in money, amounting to 1616*l.* 3*s.* 3*d.*, which bills Martin de Puech and Co. accepted, upon the security of such bank shares which were then standing in their names, and which were the only funds in their hands belonging to the bankrupts. On the day the bankrupts drew these bills upon Martin de Puech and Co., they wrote them a letter, advising that they had drawn the bills, and stating, that in case the bank shares should not ultimately produce the sum for which the bills were drawn, they would be responsible to them for the deficiency; and on the 1st of January, 1819, the bankrupts, by another letter, authorized Martin de Puech and Co. to sell the twenty-five bank shares, in order to enable them to reimburse themselves what they had to pay in respect of the bills. On the 31st December, 1818, (two days before the bills became due,) Martin de Puech and Co. stopped payment, the bank shares then remaining in their names, and the bills, were all dishonoured by them, and also by the bankrupts. At the time the defendants took these bills of exchange of the bankrupts, they did not know that Martin de Puech and Co. had the twenty-five bank shares standing in their names belonging to the bankrupts, nor were they informed thereof, until Martin de Puech and Co. had suspended their payments. A commission of bankruptcy issued against Power and Warwick on the 13th of January, 1819, and an assignment of their estate and effects was duly made to the plaintiffs on the 2d February, 1819. The defendant, Prevost, being then at Paris, on the 2d March, 1819, issued process of attachment, according to the laws of France, against the twenty-five bank shares in the hands of Martin de Puech and Co., under which attachment one of the plaintiffs, Fermen de Tastet, who was then in Paris, on the 27th of May, 1819, was duly summoned, but did not appear, and the other plaintiff, Cazenove, being in London, on the 9th of July, 1819, received notice of the proceeding at Paris, but never interfered therein. Upon the hearing of the attachment, on the 12th August, 1819, the court decreed, that the bank shares should be sold, and the net proceeds applied, so far as they would extend, to pay a balance of 1570 francs, due by the bankrupts to Martin de Puech and Co., and after payment thereof, to retire the bills so accepted by Martin de Puech and Co. in favour of the bank-

rupts. The sum of 1346*l.* was in consequence received by the defendants, on the 30th December, 1819, as the produce of the bank shares, after deducting from such produce the 1570 francs, and the costs of the proceedings under the attachment, and there was still due to the defendants a further balance, in respect of the three bills of exchange, which they claimed to prove under the commission issued against Power and Co. Martin de Puech and Co. settled with all their creditors, and paid them the sum of 4*s.* in the pound, on the amount of their respective debts, in discharge thereof, which the defendants have accepted of Martin de Puech and Co., in respect of other demands they had on them, but they were not admitted creditors on their estate for these three bills of exchange.

Platt, for the plaintiff. The assignees are entitled to recover this sum of money as money belonging to the bankrupt, of which the defendants have obtained possession since the act of bankruptcy. The legal interest in the bank shares was vested in the bankrupts. When therefore, they were converted into money, their produce was money had and received to the use of the assignees. If the question had been between Martin de Puech and Co. and the plaintiffs, it might be urged that the produce was subject to the same lien as the bank shares; but even in that case, the lien could only attach upon payment of the bills by the French house. Admitting, however, that the lien would have been available between those parties, still it is not competent for the defendant to take advantage of it; for a lien is a personal, and not a transferrable right. The French house could not avail themselves of the lien, as they had not paid the bills; and even if they could as between them and the plaintiffs, still they could not transfer their rights to the defendant. By the stat. 1 Jac. 1, c. 15, s. 13, power is given to the commissioners to assign all debts due to the bankrupts for the benefit of the creditors, and then it enacts, "neither shall the *same* be attached to the debt of the bankrupt." Now, here the bank shares have been attached as the debt of the bankrupt; and that is against the express provisions of the statute. That is not like the case of a fund appropriated to particular purposes at the time of accepting the bills; for in such a case a power is given by the owner to the appropriating party, and unless that power is strictly complied with, the owner is not bound by the appropriation. In this case, the proceeds were applied, first, to liquidate the general balance due to the French house, which was not within the scope of the trust reposed in them. Here, therefore, one creditor has obtained an undue advantage over the others, by attaching the debt due to the bankrupts, which is against the policy and provisions of the bankrupt laws.

Tindal, contra, was stopped by the Court.

BAYLEY, J.* This case has been argued very forcibly on the part of the assignees. There is no difficulty, however, as to the principle of law applicable to the case. The assignees are unquestionably entitled to all the property that belonged to the bankrupt at the time of his ac

* Abbott, C. J., was sitting at Old Bailey.

of bankruptcy; and there can be no doubt, also, that if a subject of this country, by means of legal process abroad, get into his hands, after the bankruptcy, money belonging to the bankrupt, he is liable to refund it to the assignees. The question in this case is whether the property in question was, at the time of the bankruptcy, the property of the bankrupts. Before the bankruptcy, Martin de Puech and Co. had standing in their names in the French funds 25 bank shares belonging to the bankrupts. On the faith of those bank shares, the bankrupts were allowed to draw on the French house, and the latter accepted the bills; the legal consequence of which was, that it entitled them to keep those shares as a security against the liability they had incurred by their acceptances. On the 1st of January, 1819, the bankrupts authorize the French house to sell the shares. So that, at the time of the act of bankruptcy of Power and Warwick, the French house was under acceptances for the bankrupts, with certain bank shares in their names, which they had the power to sell. Under these circumstances, Prevost, one of the defendants, the holder of the bills, on the 12th August, 1819, instituted a suit in the French court, in the course of which process of attachment issued against these 25 bank shares. At that time the bank shares stood in the name of Martin de Puech and Co., and they had a right to sell them, and apply the proceeds in discharge of their acceptances. The bankrupts could not call on the French house to give up any part of that money until they had released them from all liability in respect to those acceptances. The French court made a decree that the bank shares should be sold, and that the proceeds should be applied, first in payment of the general balance due from the bankrupts to Martin de Puech and Co., and that the residue should be specifically applied (not as the money of the bankrupts) to retire the bills, and it was so applied accordingly. At the time when the bank shares were standing in the names of Martin de Puech and Co., the bank might be considered as a stake-holder, the two houses having an interest in the money. Martin de Puech and Co. had an interest that it might be applied in discharge of their acceptances. The house of Power and Warwick had a similar interest, in order that they might be relieved from their liability as drawers, and they had also an interest in any surplus. The French court decreed, that the proceeds should be applied so as to have the effect of relieving the house of Martin de Puech and Co. *pro tanto* from their liability as acceptors, and that of the bankrupts from their liability as drawers. The question then, is, to whom the money belonged which they directed to be so applied. It seems to me, that it was the joint money of Martin de Puech and Co. and the bankrupts, neither of those houses individually having any control over it in conscience or justice. The money was applied in the manner decreed by the French court; and, therefore, had the effect of relieving Martin de Puech and Co. from their obligations as acceptors to the extent of the payment. If they had understood that, by the English law, this money would be considered as the money of Power and Warwick, they might, for their own protection, have insisted that it should be paid into their own

hands, in order that they might themselves pay it over to the defendants, and thereby exonerate themselves from all responsibility. They might then have paid it as their own money, and the assignees could have had no claims against the defendants for receiving it. Now, it seems to me, that the payment under the decree of the French court, was, to all intents and purposes, the same thing as if it had been made by the hands of Martin de Puech and Co. If it was not, the legal consequence would be, that the defendants would be liable to refund the money to the assignees, and Power and Warwick would then have the whole benefit of the money which had been standing in the bank for the security of Martin de Puech and Co., and the latter would be liable on their acceptances. That would be most unjust. I am of opinion, that by our law the assignees are not entitled to claim this money; because, when it was paid to the defendants, it was not the money of the bankrupts, Martin de Puech and Co. having an interest in having it applied in discharge of the bill which they had accepted. It is, therefore, to be considered in substance as if it had been paid by them; and, if so, the assignees have no claim. I think, therefore, that there must be judgment for the defendants.

HOLROYD, J. Notwithstanding the able argument addressed to the Court on the part of the plaintiffs, no doubt has been raised in my mind with regard to the point in question. I take it to be quite clear that the plaintiffs, as assignees, cannot recover the money now sued for, unless the bankrupts themselves, in case there had been no bankruptcy, could have recovered it as money had and received by the defendants to their use. Now I am of opinion, if there had been no bankruptcy, that the bankrupts could not have maintained an action against the defendants for money had and received to their use on the ground of this being money to which they, the bankrupts, were entitled. The bills were accepted on the faith of those bank shares in the French funds, which were bought by Martin de Puech and Co. They had more than a simple lien on it; it was in law their property, and vested in them; in trust, indeed, for the bankrupts, after satisfying their own lien. Where a person has a simple lien on goods, he cannot sell and dispose of them; but if he has a special property in those goods in trust for another, subject to a claim of his own, in such case the party may sell, in order to repay himself. The bills having been accepted, Martin de Puech and Co. were, in the first instance, liable to pay them. If they had paid them, they would have had a right to have sold the shares to reimburse themselves. An attachment was lodged in the French court, and Martin de Puech and Co. were parties to it, for a decree is made in their favour, as to that part of the property appropriated to pay them, previous to any application of any part of it to the payment of these bills. Suppose there had been no bankruptcy, would the bankrupt have been entitled to any of the proceeds of those shares in the French funds, while the bills were outstanding? I think not. Martin de Puech and Co. had the legal property in them, for they were the only persons who could sell or dispose of that property. If the bills, indeed, had been paid by the bankrupts, they would have had an equitable

interest in the bank shares. But if Martin de Puech and Co. had sold the shares, the bankrupts could not have got the money out of their hands until they had reimbursed them to the amount of their acceptances. Nor can they, now that Martin de Puech and Co. have been compelled by the decree of the French court to pay the money to the holders of the bills, recover the same from the defendants; because it was not their money until the bills had been provided for; that not having been done, I am of opinion, that they had neither the legal nor equitable property in the proceeds. It is said, however, that by the statute of James, the property cannot be attached as the debt of the bankrupt. If the bankrupts had been the only debtors, and the property had been attached, that would have come within the statute; but here the property that is attached was in law, though a trust, in some respects the property of Martin de Puech and Co. They were debtors as well as the bankrupts. For they were indebted as acceptors to the holders of the bill; and it is for the satisfaction of that debt, due on the bills, and not the debt of the bankrupt merely, that this property is attached. I think that the bank shares might be attached as the debt of Martin de Puech and Co., and the decree being that the proceeds should be applied towards the retiring of those bills, it is to be considered exactly the same as if the Court had ordered the money to be paid to Martin de Puech and Co., that they might pay those bills, and they had so paid them in compliance with that order. At all events, I think that the assignees cannot say that this is their money until they themselves have paid these bills. For these reasons, I think that there ought to be judgment for the defendants.

BEST, J. This case has been argued, not only with great ingenuity, but put on its only tenable ground. It must be considered, as if both Power and Warwick and Martin de Puech and Co. were solvent, and then it would stand thus: Power & Warwick draw on Martin de Puech and Co. in France, certain bills of exchange, and the latter accept those bills, on the express condition that they are to hold certain bank shares which stood in their names; so that in France, they were the actual legal proprietors of the shares, and they were to retain them, in satisfaction of the debt to which they rendered themselves liable by their acceptances. Now, these bills, so drawn, get into the hands of the defendants, who present them to Martin de Puech and Co. in Paris. Suppose the latter had not become insolvent, and the defendants had proceeded to get these bank shares by attachment, out of the hands of Martin de Puech and Co., the answer would be this: "You cannot attach this property, it is not the absolute property of the drawers, but it is our property; it is in our possession, it is clothed with certain rights which belong to us; until those claims are satisfied, you cannot take it out of our hands." And in a court of law it could not have been taken out of their hands. It would be necessary, in this country, to have gone into a court of equity to have ascertained those rights. The French Court has disposed of it as a court of equity would have disposed of it in this country. On the defendants in this action attaching the property in France, the Court calls on all the parties interested, as a

court of equity would do. They give notice to Mr. D. Tastet and the assignees of the bankrupt, with a view of bringing all the parties concerned before the Court. If they did not choose to appear before the Court, it is not the fault of the Judges. When the case comes before them, how do they dispose of it? Why, possessing legal and equitable jurisdiction, they decide that this property is not the absolute property of the drawers of the bills in England, but is property in which they had little interest, being mortgaged to French subjects to the extent of its value; and, indeed, on the sale of the property, it does not produce enough to pay the French mortgagees, the latter having rendered themselves responsible to the defendants in this action, by the acceptance of those bills of exchange. The Court directs, therefore, that the proceeds should be disposed of in first protecting Martin de Puech and Co., in retiring the bills; that is, they did the same thing as if they had directed the money to be paid over to the French houses, in order that they might hand it over to the holders. That was a just and equitable decision, and such as a court of equity would have pronounced in this country. Then, this money has been paid by Martin de Puech and Co., and not by the bankrupts. It cannot be considered in the hands of the defendants as money which has been received on account of the bankrupts, but as money received on account of Martin de Puech and Co.; and the defendants have received it, on condition of giving up their claim against Martin de Puech and Co. The whole fallacy of the argument consists in considering this as the money of the bankrupts; whereas, as between them and Martin de Puech and Co., it was clearly the money of the latter; for the shares were purchased in their own names, and they were suffered to continue in possession of them, so as to enable them to protect themselves against the legal consequences of their acceptances. Upon these grounds, I am of opinion that there ought to be judgment of nonsuit.

Judgment of nonsuit.

CLARIDGE *v.* EVELYN and Others.—p. 81.

An infant cannot be appointed to the office of clerk of a Court of Requests, where it is part of the duty of that officer to receive the money of the suitors.

THIS was an action upon the case, brought by the plaintiff against the defendants, as commissioners of a Court of Requests, established by an act of the 48 G. 3, for a false return to a writ of mandamus. The declaration stated, that the plaintiff had been duly elected to the office of clerk of the said Court of Requests, but had been unjustly refused admittance to the office by the defendants, the commissioners of the Court; that the plaintiff had obtained and prosecuted a writ of mandamus, directed to the commissioners, commanding them that they should admit

the plaintiff into the office of clerk, or that they should show cause to the contrary, which writ had been duly delivered to the defendants; yet that the commissioners had not admitted the plaintiff to the office, but had falsely and maliciously returned, in answer to the said writ, "that the office of the clerk of the commissioners of the Court of Requests aforesaid having become vacant by the death of one Richard Crow, then late clerk, T. K. Crow was duly elected clerk of the said Court by the major part of the commissioners, and had been since duly admitted into the office; and that the plaintiff never was elected to the office of clerk of the Court of Request, as by the writ was suggested." The declaration, after negating the facts in the return, stated that the plaintiff, by reason of the false return, had been deprived of the gains and profits which he would have derived by exercise of the office, to his damage of 500*l*. Plea, general issue. At the trial before Abbott, C. J., at the Guildhall sittings after Michaelmas term, 1819, the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case:

By the death of the late Richard Crow, on the 8th of December, 1818, the office of clerk of the Court of Requests, constituted by the act of parliament, mentioned in the declaration, became vacant. On the 8th day of January, 1819, the commissioners of the Court, at a meeting duly summoned and held according to the directions of the act, proceeded to the election of a clerk in the room of Crow. The plaintiff, and one T. K. Crow, were the candidates for the office. After the commissioners were assembled, and immediately before the election, commenced, T. K. Crow, in the hearing of the commissioners, was asked his age by Richard Allmett, which question he declined answering: and thereupon, Richard Allmett, one of the acting commissioners, notified to the rest that T. K. Crow, was an infant under the age of 21 years, and on that account ineligible to the office of clerk; and that if any commissioner should, after that, give his vote for the said T. K. Crow, such vote would be thrown away and void. At the election, each of the commissioners, as he came up to vote, was separately asked by the said Richard Allmett, for whom he voted; and the said Richard Allmett, in the hearing of each of the commissioners, publicly protested against each of the votes for the said T. K. Crow, immediately on its being tendered, and before the same was taken down or recorded, on the ground of the deficiency of the said T. K. Crow. At the close of the poll, the numbers were, for T. K. Crow, 87; G. Claridge, 44; T. K. Crow was, therefore, immediately after the election, declared by the commissioners to be elected by them as such clerk, and was returned as such clerk, and admitted to the office, and has hitherto continued to serve and act as clerk. T. K. Crow, at the time of the election, was an infant under the age of 21 years, and, at that time under articles of clerkship to Richard Crow, having attained the age of 20 on the 28th day of December, 1818; but he had, for about two years, occasionally acted for Richard Crow in his office of clerk of the Court of Requests, but without any appointment pursuant to the provisions of the act of parliament. The question for the opinion of the Court was, whether the said T. K. Crow was duly elected to the said office.

Tindal, for the plaintiff. If an infant be not eligible to this office, due notice having been given to the electors at the time of the election, the votes so given to that infant were thrown away. Whether an infant be eligible to the office in question, must depend upon the duties imposed upon the officer by law. Now, by the 48 G. 3, c. 50, by which this court was established, the commissioners are authorized to appoint one or more fit persons for each of the offices of clerk and beadle; and the person appointed is authorized to execute the office of clerk, immediately after his or their appointment, and from time to time to appoint a deputy or deputies, to act in his or their names or stead, in case of sickness, or other sufficient cause to be allowed by the commissioners, but not otherwise. By a subsequent clause, p. 17, the clerk is directed, at the prayer of the party prosecuting, to issue a precept, by way of ca. sa. or fi. fa.; and in p. 20, the clerk is directed to endorse the sum of money and costs, to be levied on the precept, to be issued upon execution awarded against the body or goods of any person; and if the party against whom such execution shall be awarded, shall, before any actual sale of the goods or his imprisonment, pay unto the clerk for the time being such sum of money and costs, then the execution shall be superseded, and the body, goods, and chattels of the party set at large; and in p. 23, amongst the fees which the clerk is entitled to take, is one for paying money into court in full, and entering the same in his book. It appears, therefore, to be part of the duty of the clerk to receive the money of the suitors, for whom he is a mere trustee, and to whom he ought to be responsible. An infant, however, would not be liable in an action for money had and received. In Co. Litt. 172 a, it is expressly laid down, that an infant cannot be receiver, for he has no skill to render an account. An infant, indeed, cannot contract, except for necessaries; and therefore, in *Whywall v. Champion*, Str. 1083, it was held, that if an infant be a mercer, and buy goods and wares for his shop, the contract is not binding upon him. Besides, this was an office which required skill and ability, and on that ground it has been decided, that an infant cannot be a mayor of a corporation, nor elected a Burgess;* *Rex v. White*, Selwyn, N. P. 9th edit. 1043, Mandamus. The circumstance of the clerk being allowed by this act of parliament to appoint a deputy, with the approbation of the commissioners, can make no difference, for no action is given against the deputy, and therefore the rule of respondeat superior applies; and the right of action would only be against the clerk.

Chitty, contra. An infant may contract for his own benefit, and, by analogy, he ought to be entitled to hold an office which is for his benefit; and in *Bristow v. Eastman*, Peake, N. P. C. 223, it was held, by Lord KENYON, that money had and received would lie against an infant for money embezzled by him. In *Young v. Fowler*, Cro. Car. 555, it was held, that a grant by the bishop of the office of register of a diocese in reversion after the death of the tenant for life, to an infant eleven years of age, exercendum per se vel deputatum sufficientem, is good, notwithstanding the infancy. Now here this office may be exercised by deputy, and therefore that case is in point.

* Comyn's Digest, tit. Infant. C. 1.

ABBOTT, C. J. No authority has been cited to show that the grant of an office of public and pecuniary trust to an infant is valid. It is true that the offices of sheriff and of jailor have been granted in fee, and that such grants are not void, on the ground that those offices may by descent vest in an infant. In those cases, however, the grantees have the power of appointing deputies. In the case of *Young v. Fowler*, where a grant by the bishop of the office of register of a diocess to an infant was held good, the grant was in reversion, and the grantee attained full age before the office descended to him. Besides, the duties of that office are not stated in the report of the case. Looking at this act of parliament, it appears that this is an office of pecuniary trust, and it seems to me, therefore, impossible to allow the grant of such an office to an infant, for in the event of his being guilty of negligence, with respect to the moneys placed in his hands, the suitors of the Court might be deprived of that remedy which they ought to have against a public officer intrusted with their money. If, on the other hand, he were to conduct himself so as to be criminally liable, he would be placed in a situation of peril, which the law is anxious he should avoid. I am of opinion, therefore, that he was ineligible to this office; and due notice of his incapacity having been given to the electors at the time of their election, their votes were thrown away, and, consequently, there must be judgment for the plaintiff.

BAILEY, J. I am of the same opinion. The commissioners are bound to appoint a fit and proper person. Now, a person who is not legally responsible for the discharge of the duties of the office, cannot, in point of law, be considered a proper person to execute it. The clerk, in this case, is to have the money of the suitors intrusted to his care; he ought, therefore, to be civilly answerable for that money, either if misapplied by himself, or lost by the negligence of his deputy. Possibly he might be liable for a tortious conversion of the money by himself; but he would not be so liable where the money was lost either by his own negligence or that of his deputy; and therefore the public, by the appointment of an infant to the office, would lose that privilege which the law gives them against the principal. I am, therefore, of opinion that an infant was not eligible to this office; and, consequently, that there must be judgment for the plaintiff.

HOLROYD, J. I am of opinion that this is an office which an infant cannot legally hold. The officer is to receive the money, which is paid into Court. The act of parliament puts a special trust and confidence in him in that respect; and that being so, I am of opinion that, independently of the provisions of the act, he could not legally appoint a deputy. In Comyn's Digest, tit. *Officer*, D. 2, it is laid down that a deputy cannot be appointed to an office, if the grant imports a trust or confidence in the person; as, to be squire to the king's body, if a deputy is not allowed by his patent, and for that the Year Book, 11 Edw. 4, 1, is cited. Now, by the provisions of this act of parliament, it depends entirely on the discretion of the commissioners, whether they will in any case, allow a deputy to be appointed; and they may insist that the office shall be executed by the party in person. I think, there

fore, the case must be considered as if the office was to be executed by the infant in person. Besides, as the law will not allow an infant to act upon his own discretion, so as to be civilly responsible for his own acts, it will not allow him to be responsible for the acts of others; and therefore, if he could appoint a deputy, he would not be liable for his acts; and if he is not responsible, he is not a fit person to be put in trust for others; for the public, who paid money to him, would be in a worse situation than if the office was filled by a person of full age, who might be sued. I am, therefore, clearly of opinion, that an infant is not a competent person to execute the special trust reposed in the officer by this act of parliament; and, consequently, there must be judgment for the plaintiff.

Judgment for the plaintiff.*

* Best, J., absent at Chambers.

HODGSON and Others, Assignees of SEATON and Others. v. GASCOIGNE.—p. 88.

The growing crops of a tenant having been seized under a *fi. fa.* a writ of *hab. fac. poss.* was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord, founded on a demise made long before the issuing of the *fi. fa.*: *Held*, that the sheriff was not bound to sell the growing crops under the *fi. fa.*, inasmuch as they could not in point of law, be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration: *Held*, also, that the sheriff had no right to allow to the landlord a year's rent, under the stat. of 8 Ann, c. 14., that statute contemplating an existing tenancy, which, in this case, must be taken to have ceased on the day of the demise in the ejectment.

THIS was an action on the case, brought by the plaintiffs against the defendant, as sheriff of the county of York, for not duly executing a writ of non omittas *fi. fa.* issued at the suit of the plaintiffs against one Charles Smith, and for making a false return to the writ. Plea, general issue. The cause was tried at the York Summer assizes, 1817, before Wood, B., when the jury found a verdict for the plaintiffs for 5000*l.* damages, subject to the opinion of the Court upon the following case:

The plaintiffs, as assignees of the estate and effects of J. Seaton and others, recovered a judgment in Trinity term, 1815, against Smith, for 20,000*l.* debt, and 80*s.* costs; and on the 14th of June, 1816, caused to be issued thereon a writ of non omittas *fi. fa.* against Smith, directed to the sheriff of Yorkshire, endorsed to levy 5446*l.* 18*s.* 5*d.* On the 1st of July, 1816, the writ was delivered to the defendant, as sheriff of the county, who granted his warrant, directed to one Foster, his bailiff, to execute the same. On the same day, the warrant was delivered to Foster, who, on the 2d of July, entered into a mansion-house, farm, and colliery, then in the occupation of Smith, called Barrowby Hall, and seized the furniture, stock, crops, colliery, engines and utensils, and other effects found or growing, or being upon the said farm. On

the 9th day of July, 1816, while in possession of the property, Foster received from one J. Clayton, as agent for the defendant, a notice demanding 886*l.* 5*s.*, being one year's rent due to the defendant from Smith, for the mansion-house, farm, lands, and coal-mines of Barrowby aforesaid. The defendant was the owner of these premises; and by indenture of the 13th February, 1813, demised the same to Smith, habendum, for 21 years, at the yearly rent of 850*l.* and 100*l.* for the colliery, with a proviso for re-entry, on non-payment of rent. In Michaelmas vacation, 1815, there being then two years and a half in arrear, a declaration in ejectment was delivered on the two several demises of the defendant, and of R. Oliver, Esq., which demises were laid on the 5th December, 1815, and judgment was obtained on the 1st July, 1816. On the 15th July, 1816, J. Clayton, as attorney for the defendant, delivered to Foster a warrant, dated 10th July, 1816, made by the defendant, as sheriff of the said county, and directed to the chief bailiff of the liberty of the Honour of Pontefract, and his deputies (Foster being also one of such deputies,) upon a writ of possession issued in the cause on the 1st of July, 1816, against Smith, to recover the defendant's and R. Oliver's term to come in the premises. Foster, having received the two warrants, sold the furniture, stock, and colliery, engines and utensils on the farm, on the 18th August, 1816, but refused to sell any of the crops then growing and unsevered thereon, which were of considerable value; and immediately afterwards delivered up possession of the farm and premises to the defendant, with the crops then growing thereon, in pursuance of the warrant issued on the writ of possession. On the 13th September, 1816, Foster paid to the land agent of the defendant 886*l.* 5*s.* for one year's rent, due to the defendant from Smith, on the 13th February, 1816, for the farm and premises. The defendant afterwards, as sheriff, returned to the writ of *fi. fa.*, that he had caused to be levied of the goods and chattles of the said Smith to the value of 1125*l.* 19*s.*, which money he had ready to render to the plaintiffs; and further certified, that the said Smith had not any other goods or chattels in his bailiwick, whereof he could cause to be levied the residue of the said debt and damages, or any part thereof.

Tindal, for the plaintiff. There are two questions in this case: first, whether the sheriff ought not to have sold the growing corn, notwithstanding the subsequent delivery of the writ of possession; and, secondly, whether he ought to have allowed the landlord the year's rent, under the statute of 8 Ann. c. 14. Now, the effect of the seizure was to vest in the sheriff the property in the things seized from the time of the delivery of the writ of execution. On the 1st of July, therefore, the property in the corn was divested out of the tenant, and vested in the sheriff, for the purpose of levying the debt; and this case must be considered as if the judgment had been obtained, and the writ had issued at the suit of another landlord. Now, the delivery of a writ of *hab. fac. poss.*, subsequent to the delivery of the *fi. fa.*, will not divest the right of property in the corn growing which was already in the sheriff. The judgment in ejectment is, that the plaintiff recover his term against the defendant, of and in the premises aforesaid. The writ orders the sheriff *quod habere facias possessionem*. This can only bind

from the time of the execution of the writ, for in an action for mesne profits, the course is to give damages up to the time of the execution of the writ. It cannot have any retrospective power, so as to take away any right vested in a purchaser of the crops. Suppose for example, the tenant had sold the crops to a purchaser, and after the sale, the sheriff entered under the habere facias possessionem, would the landlord in that case have been entitled to the growing crops? [BAYLEY, J. I think that he would, if the sale took place subsequently to the day of the demise laid in the declaration in ejectment. For from that time, the tenant must be considered as a wrongdoer.] The tenant certainly must be taken to be a wrongdoer from the 5th day of December, 1815. The statute of frauds, however, enacts that no fieri facias, or other writ of execution, shall bind the property of goods, but from the time that such writ shall be delivered to the sheriff to be executed. An hab. fac. poss. is a writ of execution, and therefore it could only bind the property from the time of its delivery.

ABBOTT, C. J. The property in the growing corn, in fact was not vested in the tenant at the time of the seizure, for after the judgment was obtained in ejectment, the defendant is to be considered, in point of law, as a trespasser from the day of the demise laid in the declaration. From that time, therefore, the property was divested out of him, and he had no property at the time when the fieri facias was delivered to the sheriff. The landlord, in an action for mesne profits, might have recovered the value of all the crops.

Tindal. If that be so, the defendant has no right to the year's rent, for the lease determined on the 5th December, 1815, as he maintains by his ejectment. The 8 Anne, c. 14. evidently contemplates an existing tenancy at the time of the execution, for the words of the statute are, "that no goods lying or being upon any messuage, land, or tenement, which are, or shall be leased for lives, term of years, at will, or other wise, shall be liable to be taken by virtue of any execution, &c." The object of the act was, to make the landlord amends for taking away his power of distress, but here he could have no distress, because there was no tenancy, and the plaintiff contends that the defendant was a trespasser, from the day of the demise laid in the declaration in ejectment.

Littledale, for the defendant, admitted that he could not claim to have the year's rent allowed; upon which

The Court ordered the verdict to be entered for the plaintiff for 886*l*.

Judgment for the plaintiff

HARDCASTLE v. NETHERWOOD.—p. 93.

Assumpsit in consideration that the plaintiff, for the accommodation, and at the request of the defendant, would accept certain bills of exchange, and would deliver them, so accepted, to the defendant, in order that he might negotiate the same for his own benefit. Defendant undertook to provide money for the payment of the said bills, as they became due, and to indemnify the plaintiff from any loss or damage by reason of the acceptance thereof. Breach, that defendant did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof the plaintiff, as acceptor, was forced and obliged to pay the holders of the bills certain sums of money, with interest, charges, and expenses: *Held*, upon demurrer, that, as plaintiff might be entitled upon this declaration to recover special damage, a set-off was not a good plea.

THE plaintiff declared, that whereas defendant, on, &c., at, &c., in consideration that plaintiff, for the accommodation and at the request of defendant, would accept certain bills of exchange drawn by defendant upon plaintiff, for 10,455*l.*, and would deliver the bills so accepted to defendant, in order that defendant might negotiate the same for his own benefit, defendant undertook, &c. to provide money for the payment of the said bills when the same became due, *and to indemnify plaintiff* from any loss or damage by reason of the acceptance of the bills. Averment, that plaintiff did accept the bills, and deliver them so *accepted* to defendant, for the purpose aforesaid. And that, although the said bills were negotiated by defendant for his own benefit, and the same have long since become due, yet defendant did not provide money for the payment of the said bills when the same became due, nor indemnify plaintiff from damage by reason of his acceptance of the bills, but refused so to do; by reason of which premises, plaintiff, as such acceptor of the said bills, was called upon, *and forced and obliged* to pay, and did then and there necessarily pay to the respective holders of the bills, divers large sums of money, together with certain interest, charges, or expenses thereon, amounting in the whole to a large sum of money, to wit, 100*l.*, and by means thereof the plaintiff is damnified to the amount thereof. Defendant pleaded the general issue, and *actio non accrevit infra sex annos*, and also a plea of set-off. The plaintiff demurred generally to the plea of set-off, and the defendant joined in demurrer.

Manning, for the plaintiff, referred to the case of *Auber v. Lewis*, E. T. 1818, K. B.; *Manning's Nisi Prius Digest*, 2d ed. p. 251., as deciding that to a declaration on a contract, upon which the plaintiff might have sued for unliquidated damages, a set-off could not be pleaded. Upon which the Court called upon

Littledale, for the defendant, who argued that the demand sought to be recovered by the first count was simply a debt, for which the defendant might have been held to bail, without a judge's order, and which might be proved under a commission of bankrupt. Sed

Per Curiam. This case cannot be distinguished from that which has been cited. The Court must look to the contract declared on, and if that is such as might entitle the party to recover special damages, the statutes of set-off do not apply, although no special damage be alleged.

Here, however, the jury might possibly give damages for the manner in which plaintiff had been *forced and compelled* to pay the amount of the bills. The defendant might, perhaps, have pleaded a set-off to that part of the count which charges the defendant with the amount of the acceptances paid by the plaintiff.

Judgment for the plaintiff.

HARLEY and Another v. GREENWOOD.—p. 95.

Declaration upon four bills of exchange. Plea in bar, that defendant was indebted to plaintiffs in divers large sums of money for goods sold; and that, for securing to the plaintiffs the said several sums of money, defendant, before his bankruptcy, accepted a bill of exchange drawn by the plaintiffs, for and in payment of one of the said several sums of money in which he was so indebted as aforesaid; and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the said several sums of money in which he so stood indebted as aforesaid. The plea then stated that defendant had duly become bankrupt; and that the bills of exchange mentioned in the declaration were proveable under the commission; and that the plaintiffs, being creditors of the defendant for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission, and thereby made their election to take the benefit of the commission, not only with respect to the debt so proved, but also as to the bills and debts mentioned in the declaration: *Held*, upon demurrer, that this plea could not be supported; first, because the proof of a debt under the commission of bankruptcy cannot be pleaded in bar to an action at law brought for the same debt; secondly, that the election of the creditor, to take the benefit of the commission, is confined by the 49 G. 3, c. 121, s. 14, to the debt actually proved, and does not extend to distinct debts ejusdem generis due at the same time.

ACTION against the defendant, as the acceptor of four bills of exchange. Plea, that before the defendant became bankrupt, and before the making of the promises in the declaration mentioned, he was indebted to the plaintiffs in divers large sums of money, amounting to 150*l.*, for goods sold, and that for securing to the plaintiffs the payment of the said several sums of money, which so amounted to 150*l.* before his bankruptcy, he accepted a bill of exchange for 47*l.*, drawn by the plaintiffs on the defendant, and payable three months after date, which bill was accepted by him in payment of one of the said several sums of money in which he was indebted as aforesaid. The plea then stated, that he had similarly accepted each of the several bills of exchange, for which the action was brought in payment of one other of the said several sums of money in which he so stood indebted as aforesaid, and so in the whole amounting to 150*l.* It then stated, that at the time he became bankrupt, and at the time of the commencement of the suit, he was not indebted to the plaintiffs in any further sum of money, than the said several sums, so amounting to 150*l.*, and in payment of which he had accepted the said several bills, and that the promises in the declaration were made by him, upon, for, and in respect of all the several sums of money in which he was so indebted to the plaintiffs, except the sum of 47*l.* The plea then stated the trading of the defendant, the petitioning creditor's debt, and that he became bankrupt, the issuing of the commission, &c. It also stated, that the bills of exchange, and the debts and sums in the declaration mentioned were provable under

the commission, and that, after the passing of the act of the 49 G. 3, the plaintiffs being creditors of the defendant for the said sum of 150*l.*, and for payment of which, the bills of exchange in the plea mentioned were given, the plaintiffs proved the sum of 47*l.*, parcel of the sum of 150*l.*, under the commission, as a debt due from the defendant to the plaintiffs, and thereby made their election to take the benefit of the commission, not only with respect to the said debt so proved, but also, as to the bills of exchange mentioned in the declaration, and to the debts and money due to them by virtue of the promises in the declaration. The second plea stated, that the defendant, before he became bankrupt, was indebted to the plaintiffs in a large sum of money, besides the money due and owing from him to them, by virtue of the promises mentioned in the declaration, to wit, the sum of 47*l.* for goods sold, and that the bills of exchange, and debts, and sums of money in the declaration, mentioned at the time of the proof, were provable, and could, and might be proved under the commission. The plea, then, after pleading the bankruptcy, &c., as in the last plea, stated that afterwards, and whilst the several bills of exchange, debts, and sums of money were provable under the commission, the plaintiffs being creditors of the said G. Greenwood the defendant as well for the money due and owing to them, by virtue of the promises and undertakings in the declaration mentioned, as for the said sum of 47*l.*, proved the latter sum under the commission, as for a debt due from the defendant to the plaintiff, and thereby made their election, &c. To these pleas the plaintiff demurred. The case was now argued by

F. Pollock, in support of the demurrer. The 49 G. 3, c. 121, s. 14, enacts, that the proving of a debt shall be deemed an election, to take the benefit of the commission, with respect to the debt so proved. Now the debt proved in this case, was a debt of 47*l.* upon one bill of exchange, and this action is brought to recover sums of money secured by four other bills of exchange. Upon the words of this part of the section of the statute, which applies to the case where the creditor first proved his debt, the election of the creditor to take the benefit of the commission, is confined to the debt actually proved, and this Court put that construction upon the statute in the case of *Watson v. Medex*, 1 B. & A. 121, which is precisely in point.

Marryat, *contra*. The first part of this section of the statute enacts, "that it shall not be lawful for any creditor who has brought any action against the bankrupt, in respect of a demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission, to prove a debt under such commission without relinquishing such action." Under that part of the clause, therefore, a creditor for several sums cannot prove a debt in respect of one of them, without relinquishing any action he may have brought in respect of the others. The statute then proceeds in the same sentence to say, that "the so proving or claiming a debt under the commission shall be deemed an election to take the benefit of such commission with respect to the debt so proved." Now the whole of this clause should be construed together, with reference to the law as it stood before the passing of the act, and the mischief intended to be remedied. Before the statute, a creditor

was not permitted both to come in under the commission, and to proceed at law at the same time for one and the same debt, though he had different securities for it, or to split a demand for that purpose. If a creditor first proved his debt, and afterwards proceeded at law, although the Lord Chancellor could not directly restrain him from pursuing his legal remedy, yet he put him to his election, and if he elected to abide by his remedy at law, he was discharged as a creditor under the commission. The object of this section of the statute is, to give the bankrupt the same remedy by way of defence at law, as he formerly had upon petition to the Chancellor. Now, if the present case had occurred before the statute, the plaintiffs would not have been permitted to take the benefit of the commission with respect to the 47*l.*, and to have their remedy at law for the other sums of money, for which they have different securities, but which compose one entire debt. It could never have been the intention of the legislature, to make the right of the creditor to proceed both at law and under the commission, depend upon the accidental circumstance of the priority of the action or the proof. In *Ex parte Dixon*, 1 Rose, B. C. 98, the bankrupt had given to a creditor two bills of exchange, one for 100*l.*, and the other for 92*l.* The creditor parted with the latter bill, and brought an action on the former, and took the bankrupt in execution. The 92*l.* bill was afterwards returned to him dishonoured, and he took it up and proved it under the commission. An application was made by the bankrupt to be discharged out of execution, on the ground that such proof was an election to relinquish the action, and to come in under the commission. The Lord Chancellor said, that the act was a remedial law, and must receive a liberal construction, and he made the order on the creditor without prejudice to his proving under the commission. In that case, the creditor had brought his action for one debt before he made his proof in respect of the other. It is an authority, therefore, to show, that a creditor proving for one debt, thereby makes his election to take the benefit of the commission with respect to all the others. In *Ex parte Hardenburg*, 1 Rose, B. C. 204, the Lord Chancellor was of opinion, that a creditor who had not proved, but who had presented a petition, impeaching the commission, and praying that it might be superseded, and that he might be permitted to prove, had made his election to take the benefit of the commission with respect to a debt upon which he had proceeded at law, and taken the bankrupt in execution, and the bankrupt was discharged out of custody. The case of *Watson v. Medex* is not exactly in point with the present. The plaintiff there, at the time of making his proof for the first parcel of the goods, the bill for which he then held, was not the holder of the bill for the second parcel; for he had negotiated that bill, and it was not returned to him until after the proof. In this case, the last plea alleges the plaintiff to have been the creditor for the whole sum at the time he proved a part, and that he was the holder of all the bills at the time he proved one. The debts are all of the same nature, viz. for goods sold, though they are secured by distinct instruments. Taking the whole of the clause together, and considering it with reference to the mischief thereby intended to be remedied, the true construction is, that the creditor should not be

allowed to come in under the commission, and to proceed at law at the same time, for one and the same debt, though he has different securities for it.

BAYLEY, J.* There are two questions raised by the pleadings in this case. The first is, whether a creditor for different sums of money, accruing due in respect of debts ejusdem generis (either in respect of several bills of exchange or of several parcels of goods sold), by proving under the commission for any one of the sums, destroys his remedy at law in respect of the rest. The other question is, whether proof of a debt under a commission of bankruptcy is, even as to the debt so proved, a bar at law in any case. If it be a bar at law, it must become so by the positive enactment of the statute. The 49 G. 3, c. 121, s. 14, enacts, "that it shall not be lawful for any creditor who has brought any action against the bankrupt in respect of any demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission, to prove a debt under such commission, &c., without relinquishing such action." If the creditor, therefore, had brought any action, he could not seek any remedy under the commission, either in respect of the debt which was the subject of the action, or of any other demand whatever, without entirely abandoning the action. The act then goes on to say, "that the proving or claiming a debt under such commission, shall be deemed an election by the creditor to take the benefit of the commission with respect to the *debt* so proved or claimed." The question then is, is the proving of the debt a bar to the action in any case? Now, the commencing of an action in one court does not destroy the right of the party to commence an action for the same debt in another court. The defendant may, indeed, plead in abatement the pendency of the former action; but he cannot plead it in bar. The statute in this case does not, in express terms, say that the proving of a debt shall be a bar; and there seem to me to be very strong reasons why it should not be so. Suppose, for example, a creditor to have proved a debt under the commission which is afterwards superseded; it would be most unjust that he should be barred of his remedy at law in consequence of his having so proved his debt. It has been said, however, that the creditor ought to be restrained from commencing his action until the commission is actually superseded. That, however, might be very injurious to him; for his debt might, in the interim, be barred by the statute of limitations. If, for example, the creditor proves a debt under the commission which had been contracted upwards of five years, and the commission is not superseded till the six years expire, he might be barred of all remedy. These inconveniences would arise, if we were to hold that the mere proving of a debt should operate as a perpetual bar. Now, the words of the statute will be satisfied, and a very beneficial remedy given to the creditor, if we hold that, where a creditor has proved his debts, and afterwards brings an action, the bankrupt may, under this act, apply to the Chancellor to expunge the debt, or to the court in which the action is brought, to stay the proceedings. The latter was the course adopted in the case of *Watson v. Medex*, 1 B. & A. 121

* Abbott, C. J., was absent at the Old Bailey when this case was argued.

In *Kemp v. Potter*, 6 Taunt. 549, the plaintiff, after he had commenced an action, proved his debt under the commission; the defendant having pleaded bankruptcy, ruled the plaintiff to reply; the plaintiff moved to set aside that rule, with costs, on the ground that the mere proof of the debt under the commission was an election, and that by force of the statute the action was at an end. The Court, however, were of opinion, that the defendant had a right to have some entry on the record to show that the action was abandoned, and they discharged the rule. It is clear, therefore, that in that case the Court of Common Pleas did not consider the mere proof of the debt to operate as a bar to the action. For these reasons, it seems to me that this statute does not make the proof of the debt under the commission an absolute bar to the remedy at law, but only gives to the bankrupt an opportunity of applying for relief, either to the Court in which the action is brought to stay the proceedings, or to the Chancellor to expunge the debt. But if that were not so, I am of opinion, that the statute does not apply to the present case. The words are, "that the proving or claiming a debt under such commission shall be deemed an election by the creditor to take the benefit of the commission with respect to the debt so proved or claimed." Now, the debt so proved in this case was 47*l.* only. The argument is, that as there were many other debts *ejusdem generis* due to the plaintiff at the same time, it must be considered as proof, not only as to the 47*l.*, but as to the whole of the debt due from the defendant to the plaintiff, or, in other words, the proof of parcel of the debt must be considered as proof of the whole; but that is by no means a legitimate conclusion from the premises. The 47*l.* was a distinct debt, due upon one bill of exchange, and the other sums of money were distinct debts, due on the other bills, and the bills themselves were not given for that which had been one entire debt, but in payment of distinct sums of money due for four several parcels of goods; and the debts, therefore, were originally contracted as distinct and separate debts. I cannot, therefore, say that the proof of the 47*l.*, which was not originally parcel of one entire debt, and which was not afterwards covered by one entire security, can be considered as any proof of the other debts; and I am, therefore, of opinion, that although the creditor is to be considered as having made an election in respect of the 47*l.*, the debt proved, he is not to be considered as having made an election as to the other distinct debts *ejusdem generis* due at the same time. The judgment, therefore, must be for the plaintiff.

HOLROYD, J. I am also of opinion that the plea cannot be supported. The statute 49 G. 3, c. 121, s. 14, provides for different cases; the one where an action is brought before the debt is proved, and the other where the debt is proved previously to any action. With respect to the first case, the words are very general, and amount to an absolute prohibition of the proving any debt, until the action is abandoned. According to the literal construction of that part of the clause, therefore, the bringing of an action for one debt will prevent the creditor from proving altogether, though for a distinct debt. With respect to the second case provided for, the statute enacts, "That the proving or claiming a debt under the commission, shall be deemed an election by

the creditor, to take the benefit of the commission with respect to the debt so proved or claimed." The words of the statute do not make the proof of a debt an election with respect to separate and distinct debts, but only with respect to the debt actually proved or claimed. In this case, the debt proved was a distinct and separate debt. The words, therefore, of this part of the section, do not make the proof of that distinct debt such an election to take the benefit of the commission, as to deprive the plaintiff of his right of action in the present case. I am clearly of opinion that it is no bar to the action; if it were, it would, in some cases, operate as a great hardship upon the creditor; for example, after the proof of his debt, the commission might be superseded, and if he were not allowed to bring any action while the commission was pending, he might be barred by the lapse of time. It might indeed happen, that the debt proved was the only debt due to the creditor himself at the time he made the proof. That was the case in *Ex parte Dickson*. In this very case, the four bills of exchange might have been in the hands of other parties, at the time when the plaintiff proved his debt in respect of the other, and it would certainly be a great hardship upon him, that the proof of the only debt then due to him should bar him of his right of action in respect of debts that afterwards accrued. For these reasons, I am of opinion, that, although if an action be brought after proof of a debt, it may be a ground for a defendant, either to apply to the court in which the action is brought to stay the proceedings, or to the Chancellor to expunge the debt, still the previous proof of the debt cannot be pleaded in bar to the action, and, consequently, that in this case there must be judgment for the plaintiffs.

BEST, J. It is unnecessary to decide in the present case, whether the proof of the very debt for which the action is brought, which would have been an election to take the benefit of the commission as to that debt, could have been pleaded in bar. I incline to think that it could not, for, to make it a good bar, the debt must be extinguished. Now, here, there was no extinguishment of the debt; for, if the commission had been superseded, the party would clearly have had a right to bring an action. The proper course in such a case for the party to pursue, is either to apply to the Chancellor to expunge the debt, or to the Court in which the action is brought to stay the proceedings. In the latter case, the Court may stay the proceedings only upon the defendant's undertaking not to plead the statute of limitations in case the commission were superseded. I am, however, clearly of opinion, that the facts stated in the plea afford no answer to the present action. The substance of the plea is, not that the plaintiff has proved the debt, but that he has proved another debt, and that that proof is an election to take the benefit of the commission in respect of all the debts then due to him from the bankrupt. The statute only says, that if a party proves a debt, he makes his election as to that debt; and we should go greatly beyond the words of the statute, if we were to hold that he made his election, not only as to that debt, but as to every debt due to him. The instances already mentioned show, that if that were the law, it might be attended with great injustice. For these reasons, I think there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

LAWRENCE v. ABERDEIN.—p. 107.

▲ policy was effected on living animals, warranted free from mortality and jettison. In the course of the voyage, some of the animals, in consequence of the agitation of the ship in a storm, were killed; and others, from the same cause, received such injury that they died before the termination of the voyage insured: *Held*, that this was a loss by a peril of the sea, for which the underwriters were liable.

ASSUMPSIT upon a policy of insurance. The declaration stated a total loss of the animals insured, by perils of the sea on the voyage. Plea, general issue. At the trial before Best, J., at the London sittings after Trinity term, 1820, a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case:

The policy was effected on the 30th December, 1819. The voyage insured was at and from Cork to Barbadoes and St. Vincents, and at the foot of the policy the insurance was declared to be on thirty mules, ten asses, and thirty oxen, warranted *free of mortality and jettison*. On the 17th January, 1820, the ship sailed with the animals insured, properly stowed on board, on the voyage insured. On the 19th of the same month a violent storm arose, which caused the ship to labor and pitch. This lasted, without intermission, until the 30th of the same month, when, for the preservation of the ship and cargo, and on account of the damage which the ship had sustained from the violence of the storm, the ship put into Mount's Bay, in Cornwall, in order to refit. On the 1st day of the storm, from the violent pitching and rolling of the ship, occasioned by the storm, and consequent agitation of the sea, two of the mules, one of the oxen, and five of the asses were killed; the remainder of the animals, from the same causes, and perils of the sea, on that and the following days, until the 30th of January, received such violent and severe bruises, lacerations, and injuries, that all of them died in consequence thereof, before the ship sailed again in prosecution of her voyage from Mount's Bay, which she did on the 14th February, 1820, excepting six mules and one ass, one of which six mules afterwards died from the same cause, before the arrival of the ship at St. Vincents. The ship arrived at St. Vincents, with the remaining five mules and one ass, on the 24th March, and delivered the rest of the cargo in safety. The question for the opinion of the Court was, whether the plaintiff was entitled to recover for the loss of all or any, and which, of the animals insured?

F. Pollock, for the plaintiff. The underwriters are not exempted from the loss that has happened by the words of the special exception, "warranted free from mortality." These words were introduced into the policy by the underwriters, and must therefore be taken most strongly against them. The word "mortality" signifies death arising from natural causes. Here, the death of the animals arose directly from the violence of the tempest, and not from natural causes. The loss did not therefore arise from mortality, if that word be understood in its ordinary and popular meaning. Some effect will be given to the exception by construing the word in that sense; for the underwriters will thereby be exempted from one species of loss for which they might

otherwise be responsible, viz., in the event of the death of the animals by sea-sickness in a storm. For such a loss the underwriters would be answerable under a common policy. But they would be exempted by the special exception.

Campbell, contra. Some effect must be given to the words of the exception, so as to extend to the underwriters a protection against some species of loss to which they would have been liable, if those words had not been introduced into the policy. Now they would not have been liable for any loss arising from the natural death of animals, but they would have been liable if they had been drowned in a tempest or killed in battle. Pothier, *Traité du Contrat d'Assurance*, c. 1, s. 2, art. 2, s. 3, and Valin, *Ordonnances de la Marine*, liv. 3, tit. 6, art. 11. Here the animals died in consequence of the injury they received during the storm, and the underwriters, therefore, would have been liable for this loss, under a policy in the common form. The exception, therefore, was introduced for the purpose of exempting them from all losses whatever, arising from the vitality of the subject-matter insured, or, in other words, to reduce the risk to the same level as if the subject-matter insured was inanimate goods. If that had been the case here, the cargo might have received little or no injury. If the words "free from mortality" be construed only to protect the underwriters against losses arising from death from natural causes, no effect whatever will be given to the exception; for, in such a case, the underwriters would not have been liable under a policy in the common form. The true meaning of the exception is, that the underwriters are to be liable for all the risks to which they would have been subject, if they had insured inanimate goods. By this construction they will still be liable for losses by capture by enemies or pirates, or barratry of the master or mariners.

ABBOTT, C. J. I am of opinion that the underwriters are answerable for this loss. The insurance was on living cattle, which in the course the voyage have been killed by the rolling of the ship in a violent tempest. They have been killed, therefore, by a peril of the sea. Under the general terms of the policy, the underwriters would be answerable. It lies on them, therefore, to show that there is a special exception in this policy, applicable to the present case, in order to relieve them from the effect of their general liability. The expression used in the policy is "free from mortality." Now the word mortality, in its ordinary sense, never means violent death, but death arising from natural causes. There may, however, indeed, be a remote cause, which may sometimes superinduce a natural cause. In *Tatham v. Hodson*, 6 Term. Rep. 656, the want of provisions was the immediate cause of the death of the slaves; the remote cause was the circumstance of the ship having been driven out of her course by the perils of the sea, in consequence of which, the provisions, which otherwise would have been sufficient for the voyage, were exhausted. There was not any exception in the policy in that case. But the statute of the 34 Geo. 3, c. 80, s. 10, had enacted, "that no loss or damage should be recoverable on account of the mortality of slaves, by natural death or ill treatment, or against loss by throwing overboard of slaves, on any account whatsoever." A question was made, whether the death of the slaves so aris-

ing, indirectly and remotely from the perils of the sea, was not one for which the underwriters were liable; and the Court held that they were not liable, because it was a loss arising by natural death; and if the ship, in this case, had been driven out of her course by the perils of the sea, and the voyage thereby had become so protracted as to exhaust all the provisions, and consequently, the means of sustaining the life of the animal insured, I think that the words "warranted free from mortality," introduced into this policy, would have protected the underwriters from that loss for which they otherwise would have been liable, as for a loss arising from the perils of the sea. And if there be any one case, in which effect can be given to those words, understanding them in their ordinary and popular sense, they ought not to be extended beyond that sense. There is a very great difficulty, in construing these words, to give a protection to the underwriters against all losses arising from the vitality of the animals. Suppose, for example, a valuable horse, by the motion of a vessel in a storm, were to have his legs broken, but to arrive alive at St. Vincents, the animal would be of no use; the underwriter would be liable for that loss; but if the animal were actually killed, he would not be liable at all. It could hardly be the intention of the underwriter that he should be liable in one of these cases and not in the other. If the construction I have put upon this very ambiguous phrase is not the sense in which it has been generally understood at Lloyd's Coffee-House, it will be very easy to introduce into policies other words, which shall more clearly express the meaning of the parties. In this case, therefore, there must be judgment for the plaintiff.

BAYLEY, J. My mind has not been free from doubt during the discussion of this subject; but I am now of opinion, that the assured is entitled to recover. Under a policy in the common form, the assured would have been entitled to recover, either in case of the total destruction of the animals, or for any less injury, provided it was occasioned by any of the perils insured against. The words, "warranted free from mortality," are introduced into this policy by the underwriter for his benefit. It is his duty, therefore, to take care to frame his exception in words sufficiently large and extensive, to meet all those descriptions of loss against which he intends to protect himself. The word "mortality," may, under certain circumstances, include every description of death, every termination of life to which mortals are subject. It applies generally, however, to that description of death which is not occasioned by violent means. If a great number of the crew, or of animals shipped on board a ship, were killed in the course of an engagement with an enemy, it would not be correct to say that there had been a great mortality among the crew, or among the animals. If, on the other hand, they had come to their death by any natural cause, the term *mortality* would be properly applied to express the cause of such death. If, in this case, the animals insured had died from sea-sickness, occasioned by the agitation of the ship, or in consequence of any other disease, contracted in the course of an unusually protracted voyage, the term mortality might apply to that description of natural death, so superinduced by the voyage. Under a common policy, if the declara-

tion stated that the ship had met with tempestuous weather, and that the animals thereby became disordered, diseased, and died, and it be proved that their death was imputable to the agitation of the ship, occasioned by the tempestuous weather, that would be a loss by a peril of the sea, for which the underwriters would be liable. The exception introduced into this policy would, in my opinion, protect them from such a loss. The word "mortality" here used, may, therefore, receive a construction which will afford some protection to the underwriter, without extending it beyond its ordinary and popular sense. If we were to hold, that the exception protected the underwriter from every loss to which the property was subject, in consequence of the subject-matter insured being alive, instead of dead, this absurd consequence would follow, that if by the violent agitation of the sea the animals had their legs broken, and thereby became of no value to the owner, but arrived alive at St. Vincents; the underwriter would be responsible. Whereas, if they had died during the course of the voyage, he would not be liable at all. The circumstance of these words of the exception not being calculated to protect the underwriter from any loss, in the event of the animals receiving any injury short of death, seems to me to show, that they were not intended to exempt him from a loss by the actual death arising immediately from a peril of the sea. I think that the words used in this exception will protect the underwriter in cases where the death of the animal arises from natural causes remotely produced by some of the perils insured against; but that they will not protect him where such death arises directly from any of the perils insured against. For these reasons, I am of opinion that there must be judgment for the plaintiff.

HOLROYD, J. I am of the same opinion. Although death may have been the immediate cause of the loss, and may have made the actual loss to the assured greater than it otherwise would have been, still, as the injury to the animals which occasioned their death was caused directly by the violence of the storm, I am of opinion that this is to be considered as a loss by the perils of the sea. It, consequently, falls within the risks enumerated in the policy: and, it seems to me, that it is not excepted out of those perils by the words "warranted free from mortality and jettison." Independently of those words, the underwriters would undoubtedly have been liable for a loss arising from a peril of the sea. Those words were the language of the underwriters, and were introduced by them to protect themselves from a particular species of loss. By the terms of the policy, they insured against the perils of the sea, &c., and all other losses and misfortunes that should come to the hurt, detriment, and damage of the subject-matter insured. Now, the exception must be considered as engrafted upon these general words in the policy, and the whole should be read together as one sentence; and then it would stand thus: that the underwriters will be liable for losses by perils of the seas, and all other losses, except losses by mortality and jettison. It seems to me, that as the injury which immediately preceded and caused the death of the animals, proceeded directly from the violence of the storm, the loss is to be considered a loss by the perils of the sea. Death may or may not

have increased the amount of the actual loss to the assured. With respect to the mules and asses, the entire loss rose from the perils of the sea, and was neither increased nor diminished by their death. For, after receiving a mortal wound, they became of no value to the owner, and death consequently did not in any degree increase the loss. The case might be different with respect to the oxen; if they were killed after receiving an injury, their flesh might be of some value as food, and, consequently, their death may have increased the loss in some degree. But still, as the previous injury was occasioned by the perils of the sea, whether the death of the animal did or did not increase the amount of the actual injury to the owner, I am of opinion that it must be considered a loss by the perils of the sea. The circumstance of the parties having inserted in exception of the word *jettison*, satisfies me that they did not contemplate the case of violent death. For, although it is possible that the animals thrown overboard might, under favourable circumstances, reach the shore and survive, yet I think that the term usually denotes the throwing overboard in a storm, when there would be little probability of animals surviving; and that it must, therefore, mean a jettison whence death ensues. Now, if the term "mortality" were intended to protect the underwriter in every case of the animals meeting with a violent death, the introduction of the word "jettison" would be superfluous, as that species of loss would be covered by the word "mortality." Besides, this absurd consequence would follow; if we were to give to the words used in the exception the construction contended for by the defendant, that where the violence of the wind and waves was so great as to cause the death of the animals during the voyage, the underwriters would not be liable at all; but where the violence of the wind and waves was only such as to cause some injury to the animals, short of death, then the underwriters would be responsible. For these reasons, I am of opinion that the word *mortality*, in this policy, must be understood in its ordinary and popular sense, as importing death arising from natural, and not from violent causes. And that being so, there must be judgment for the plaintiff.

BEST, J. I am of the same opinion. At the time when this policy was effected, this country was at peace with all the world, and there was not any probability of the vessel being captured by enemies. Capture by pirates on the voyage insured was equally improbable, and a loss by barratry was not very likely to happen. If the underwriters are not liable for the loss in question, they can hardly be liable in any case, for there is not any other species of loss arising from the destruction of the animals, of which death may not be considered the immediate cause. If the ship was even sunk or burnt, death would be the immediate cause of the destruction of the animals, and consequently, according to the construction contended for, such a case would fall within the exception as a loss by mortality. The exception is introduced into the policy by the underwriters. If they had intended to exonerate themselves in every case of death occasioned by a peril of the sea, they should have used words apt and proper to express that intention. They might have stipulated, that they would not be

liable for the death of the animals unless the ship were stranded on lost, and then they would not have been liable for the loss that has occurred in this case. They have only stipulated, that they will not be liable for loss by mortality. That word, in its ordinary and popular sense, signifies death arising from natural causes, and not from violence. I think, therefore, that the underwriters must be taken to have intended to exempt themselves, by this exception, from that species of loss which occurred in *Tatham v. Hodgson*, viz.: a loss of which death was the proximate cause, and the perils of the sea the remote cause. Here the injury done to the animals arose directly and immediately from the violence of the tempest, or, in other words, from the perils of the sea. For these reasons, I am of opinion that the plaintiff is entitled to the judgment of the Court.

Judgment for the plaintiff.

LONGRIDGE and Others v. DORVILLE and Another.—p. 117.

The giving up a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and, therefore, where a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings, the agents of the owners of the vessel detained, agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of damages done, to indemnify them, and to pay a stipulated sum by way of damages: *Held*, that there being contradictory decisions as to the point, whether ship owners were liable for an injury done while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages.

DECLARATION alleged, “that before the making of the promise, &c., a certain ship, called the *Carolina Matilda*, had then lately in a certain place, (to wit,) in the river Thames, (to wit,) at, &c., run foul of a certain other ship called the *Zenobia*, whereby the said last mentioned ship had received great damage. And the said last mentioned ship having received such damage, in consequence of being so run foul of as aforesaid, the plaintiffs, being the agents in that behalf of one — Symonds the owner of the *Zenobia*, and the defendants, being the agents in that behalf of the owners of the *Carolina Matilda*, the former, as such agents, detained the *Carolina Matilda*, till the owners of the said last mentioned ship should have made good to them the damage so done to the *Zenobia*.” It then stated, “that in consequence of such detention, the defendants undertook that they would, on the plaintiffs renouncing all claims on the *Carolina Matilda*, and on proving the amount of the damages sustained by the *Zenobia*, indemnify the plaintiffs for any sum not exceeding 180*l.*, the exact amount to be ascertained when the said latter ship should have been repaired;” and then alleged, that, in consequence of such undertaking, the plaintiffs did renounce all claim on the *Carolina Matilda*, and did permit and allow

her to proceed on her voyage, and that the *Zenobia* had been repaired, and that the amount of such repairs was ascertained. There were also the common counts, and the defendants pleaded the general issue. The cause was tried before Abbott, C. J., at the sittings after Easter term, 1820, when a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case:

The Norwegian ship, called the *Carolina Matilda*, on her voyage to Norway, in sailing down the river Thames in November last, ran foul of the ship called the *Zenobia*, then lying at anchor, and in consequence of which the latter ship sustained considerable damage. The plaintiffs, acting as the agents of Mr. R. Symonds, the owner of the *Zenobia*, instituted a proceeding in the High Court of Admiralty against the ship *Carolina Matilda*, to compel her owners to make good the damages sustained by the *Zenobia*, in consequence of being so run foul of. Process was issued against the *Carolina Matilda*, under which she was arrested at Gravesend on the 22d November last, and on the 24th day of the same month, the defendants wrote a letter to the plaintiffs, of which the following is a copy: "Messrs. Longridge, Barnett, and Hodgson. Gentlemen, in consequence of your having detained the Norway ship *Carolina Matilda*, till the owners make good to you the damage done to the *Zenobia*, bound to Smyrna, we hereby engage, on your renouncing all claims on the said ship *Carolina Matilda*, and on proving the amount of damages sustained by the *Zenobia*, to indemnify you for any sum not exceeding 180*l.*, the exact amount to be ascertained when the *Zenobia* is repaired." The defendants were the agents of the owners of the *Carolina Matilda*, and upon the receipt of this letter, the plaintiffs withdrew the proceedings in the Admiralty Court, and the officer, then in possession of the *Carolina Matilda*, was then also withdrawn, and such possession delivered up to the defendants, acting on behalf of her owners. The *Zenobia* had been since repaired, and the amount of damages sustained by her had been ascertained. At the time the *Carolina Matilda* sailed, and while she was proceeding down the river and ran foul of the *Zenobia*, she had the regular Trinity-house pilot aboard, who had been placed there by the defendants.

Puller, for the plaintiff. It is not necessary to consider the question, whether the owners of the *Carolina* are liable for the damage done to the *Zenobia*, under the circumstances of the case; for the defendants have made themselves liable by an express promise, founded upon a good consideration. The plaintiffs agree to release the ship, which they might otherwise have detained until bail was given; and the defendants agree to pay a stipulated sum by way of damage; waiving all question as to the legal liability of the owners. That might be considered as doubtful, there having been contradictory decisions.* The defendants, or their principals, therefore, have obtained a benefit by the immediate release of the ship; and that constitutes a good consideration for the promise laid in the declaration.

F. Pollock, contra. There is no sufficient consideration for the promise in the declaration, because the plaintiffs had no ground for insti-

* *Neptune the Second*, Dodson, Adm. R. 467. *Ritchie v. Bowsfield*, 7 Taunt. 309.

tuting the suit in the Admiralty Court against the *Carolina*. The question whether the defendants are liable upon their undertaking, must depend upon this, whether the owners were liable for the injury, the ship at the time having on board a pilot, as required by the act of parliament. If they were not liable, the plaintiff had no right to institute the suit in the Admiralty Court; and the forbearance of a suit, where a party is not liable, is not a good consideration. *Tooley v. Windham*, Cro. Eliz. 206, and *King v. Hobbs*, Yelverton, 25, are authorities in point.

ABBOTT, C. J. I am of opinion, that there is a sufficient consideration in this case to sustain the promise, without inquiring whether the owners of the ship are liable, under the circumstances of the case. It appears that a suit had been instituted by the plaintiffs in the Court of Admiralty against the *Carolina Matilda*, to compel her owners to make good the damage done by her running foul of another vessel. The ship might have been redeemed from that suit, by the defendant's giving bail, that proper care should be taken of the ship, and that those on board her should not leave the kingdom, until means were taken to secure that evidence which would enable the Judge to decide the suit, and the plaintiffs might have insisted on such bail. The defendants, as agents for the foreign owners of the ship, write a letter, in which they engage, on the plaintiff's renouncing all claims on the ship, and on proving the amount of damages sustained by the *Zenobia*, to indemnify them for any sum not exceeding 180*l.*, the exact amount to be ascertained when the *Zenobia* is repaired. Now the plain meaning of that engagement appears to me to be this. Release the ship, and we will waive all questions of law and fact, except the amount of damage; we will pay you 180*l.* if the damage done amounts to that sum. The plaintiffs, by not insisting upon the bail required, therefore relinquished a benefit which they might have had, if the law had been with them. The law might fairly be considered as doubtful, for there had been contradictory decisions on the subject; and the parties agree to put an end to all doubts on the law and the fact, on the defendants engaging to pay a stipulated sum. I am of opinion that this case is distinguishable from those cited in argument, inasmuch as in this case the law was doubtful, and the parties agreed to waive all questions of law and fact. I am therefore of opinion, that the plaintiff is entitled to recover.

BAYLEY, J. I am of the same opinion. Where a cause is depending, it is competent to a party to refer the questions of liability and damage jointly, or to acknowledge his liability, and refer the question of damage only; and in this case, I think, the effect of the agreement is, that they the defendants acknowledge the liability of the owners, and, in consideration of the plaintiff's releasing the ship, they agree to refer the question as to the amount of damage, and pay the same, provided it does not exceed 180*l.* If it had appeared, in this case, that the owners of the *Carolina* could not have been liable at all, I agree that the consideration for the promise would have failed. But the facts stated in the case by no means show that the owners would not have been liable; for by the pilot act, the owners are only protect

and in those cases where the loss arises from the default, neglect, incapacity, or incompetency of the pilot. Now there is no fact in this case which shows, that misconduct of the pilot was the cause of the injury.

HOLROYD, J. I am of the same opinion. If a person is about to sue another for a debt, for which the latter is not answerable, the mere consideration of forbearance is not sufficient to render him liable for that debt. Any act of the plaintiff, however, from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, is a sufficient consideration to support a promise. Now, the consideration of forbearance is a benefit to the defendant, if he be liable; but it is not any benefit to him, if he be not liable. The authorities cited proceed on that ground. This case differs materially from those; for here, a suit actually commenced is given up, and a suit, too, the final success of which was involved in some doubt. The plaintiff might sustain a detriment by giving up all claim in respect of the expenses incurred, and the defendant might derive a benefit, by having that suit put an end to, without further trouble or investigation. Now I am of opinion, that the giving up of a suit instituted for the purpose of trying a doubtful question, and consenting to deliver up the ship, which otherwise might have been detained until the security required was given, is a good consideration to support a promise to pay a stipulated sum, by way of damage, in case the actual damage amount to that sum. In Com. Dig. tit. *Action on Case upon Assumpsit*, F. 8., it is laid down, that an action does not lie, if a party promise, in consideration of a surrender of a lease at will; for the lessor might determine it, unless there *was a doubt* whether it was a lease at will or for years; and 1 Roll, 23 l. 25, 35, and 1 Brownlow, 6, are cited. That is an authority to show, that the giving up of a questionable right is a sufficient consideration to support a promise. Here, therefore, the giving up of a suit, instituted to try a question respecting which the law is doubtful, is a good consideration to support a promise. I think, therefore, that this action is sustainable.

BEST, J. concurred.

RAWLINSON v. PEARSON and Others.—p. 124.

A pawnbroker is a broker within the 5 G. 2, c. 30, s. 39, and, therefore, subject to the bankrupt laws.

A person who had formerly taken in goods upon pledge, but had ceased to do so, still continuing to sell the unredeemed pledges, thereby carries on the trade of a pawnbroker, and is subject to the bankrupt laws.

ASSUMPSIT for money had and received. Plea, general issue. At the trial before PARKE, J., at the Lancaster Spring assizes, 1820, a verdict was taken for the plaintiff subject to the opinion of the Court on the following case:

On the 2d June, 1818, a commission of bankrupt issued against the plaintiff, on the petition of Daniel Potter, under which commission the

plaintiff was declared a bankrupt, and the defendants were chosen assignees, and as such, received certain money, the produce of the estate of the plaintiff. The petitioning creditor's debt was upon a promissory note, drawn by the plaintiff, in favour of Potter, for the sum of 311*l.* 3*s.* 9*d.*, bearing date the 17th January, 1818, payable at three months after date, and which note was dishonoured when due. This note had been given by the plaintiff to Potter for the amount of the damages and costs awarded to Potter in an action brought by him against plaintiff, for an injury occasioned by the negligence of one of the agents of the plaintiff. The award was made on the 15th January, 1818. The plaintiff, for many years, had carried on the business of a pawnbroker at Manchester, but for nearly five years before the issuing of the commission, he had ceased to take in any goods to pledge; he had a shop for sale and another for taking in pledges. The two shops adjoined each other; there had been an internal communication between them, until it was stopped up about five years ago: his pawnbroker's sign, however, remained over the door of the shop for sale until after the issuing of the commission. After the time when he so ceased to take in goods to pledge, he sold, from time to time, to any persons willing to purchase the same, different articles of the forfeited or unredeemed pledges which he had received in the course of his business as a pawnbroker, and which still remained upon hand; the shop for sale remained open, till the issuing of the commission, to sell off his forfeited pledges, and he could not carry on his business without it. The act of bankruptcy was committed in February, 1818.

Tindal, for the plaintiff. There are two questions in this case, first, whether a pawnbroker is subject to the bankrupt laws; 2dly, assuming that he is, then, whether the plaintiff in this case continued to carry on the business of a pawnbroker at the time when the petitioning creditor's debt accrued. A pawnbroker is not a trader; for he does not seek his livelihood by buying and selling. The question, then, is, whether he can be considered as a broker within the meaning of the 5 G. 2, c. 30, s. 39. That section of the statute recites, that bankers, brokers, and factors are intrusted with money and goods belonging to other persons; and then enacts, that they shall be subject to the bankrupt laws. The reason of the statute is on account of the great value of property belonging to others with which the persons there described are trusted. Now, pawnbrokers are not within the reason of the statute, for the property which they have in their possession, belonging to others, does not usually greatly exceed in value the money advanced upon it. There is not, therefore, the same trust reposed in them as there is in the case of bankers, or brokers, or factors. They are not, therefore, within the spirit of the statute; nor are they within the words of the statute; for they cannot be considered as brokers; that term being used to denote a person who makes bargains for other persons. They were not considered brokers at the time when the 5 G. 2, c. 30, passed. The statute 1 Jac. 1, c. 21, speaking of the sworn-brokers of the city of London, describes them to be persons who never, of any ancient time, used to take pawns and bills of sale of garments and apparel, &c., for money lent upon usury, or to keep open shops.

as of late years had been used by citizens, assuming to themselves the names of brokers and brokerage, as though the same were an honest trade; terming themselves brokers *whereas in truth* they are not, abusing the true and ancient name and trade of broker. In sect. 8 they are styled counterfeit brokers and pawn takers upon money, &c. They are not again mentioned in any other statute before the 5 G. 2, s. 30, passed. In the 30 G. 2, c. 24, s. 4, they are described as persons who take goods by way of pawn. In the 25 G. 3, c. 48, they are, for the first time, called pawnbrokers by the legislature. At all events, the plaintiff had ceased to carry on the business of a pawnbroker at the time when the petitioning creditor's debt accrued. The 30 G. 2, c. 24, describes pawnbrokers to be persons taking goods by way of pawn, pledge, and exchange. Now, the plaintiff had ceased to take goods by way of pledge long before the petitioning creditor's debt accrued. He, indeed, sold the unredeemed pledges. That was not any necessary part of his business of a pawnbroker described in the statute; it only became necessary in consequence of the pawners not redeeming the goods pledged within the time prescribed by law. At all events, this was only one part of the business belonging to a pawnbroker.

Parke, contra. A pawnbroker is a person subject to the bankrupt laws, and falls within the meaning of the word broker in the 5 G. 2, c. 30, s. 39. Lord HARDWICKE, within five years after the passing of that statute, stated that he was clearly of opinion, that "a pawnbroker was within the several statutes concerning bankrupts, and especially within the general words of the 5 G. 2, and that, although pawnbrokers are not expressly named, yet the general word *brokers* is the genus, and all other kinds of brokerage, the species." *Higmore v. Molloy*, 1 Atkyns, 206. It seems therefore, that, at the time of passing the act, a pawnbroker was considered as a species of broker. He seems, indeed, to be a person contemplated by the very first statute made against bankrupts, the 34 and 35 Hen. 8, c. 4. For a pawnbroker is "a person obtaining into his hands great substance of other men's goods." The stat. of the 5 G. 2 did not contemplate such persons only; for a broker (one of the persons expressly named) is very rarely intrusted with the possession of the goods of the persons for whom he makes bargains. Assuming, therefore, that a pawnbroker is a subject of the bankrupt laws, the present plaintiff continued to carry on that business at the time when the petitioning creditor's debt accrued. The profits of the business (if fairly conducted) are derived wholly from the increased rate of interest which pawnbrokers are allowed to take on the money they advance upon goods. They are authorized to sell the goods pledged at the expiration of one year, provided they are not redeemed within that time. In that case, unless they sell the goods, they could not derive any profits whatever from their business, because they would not receive that interest which the law allows them as their only profit. Indeed, if the plaintiff ceased to carry on the business of a pawnbroker when he discontinued taking in goods on pledge, the consequence would be, that he would have been guilty of usury, by taking that rate of interest which the law allows a pawnbroker alone to receive. The plaintiff in this case, at the time when the petitioning creditor's debt

accrued, was still selling the unredeemed pledges, and receiving the increased interest on account of the money he had advanced; he therefore continued to carry on the business of a pawnbroker. This very case was, on a former occasion, argued fully before the Judges* of the Court of Common Pleas at Lancaster, and they, after great consideration, gave judgment for the defendants.

ABBOTT, C. J. I am of opinion, that a pawnbroker is a broker within the meaning of the stat. 5 G. 2, c. 30. The 39th section of that act recites, "that persons dealing as bankers, brokers, and factors, are frequently intrusted with great sums of money, and with goods and effects of very great value belonging to other persons," and then enacts, "that such bankers, brokers, and factors, shall be subject to this and other statutes made concerning bankrupts." Now, a pawnbroker certainly is a person contemplated in the preamble. For in the course of his trade, he is perhaps more frequently than other persons, intrusted with goods and effects of value belonging to others. He comes also within the general name of broker. The opinion of Lord HARDWICKE upon this subject is entitled to great weight; but even without the aid of his authority, I should have entertained no doubt, that a pawnbroker is within the spirit and words of the act. The next question is, did the bankrupt continue to carry on the trade of a pawnbroker, at the time when the petitioning creditor's debt accrued? Now, the trade of a pawnbroker consists of two parts: first, that of receiving pledges of others, and secondly, that of selling those pledges. In this case, he had ceased to take in pledges, but he continued to sell them, subject to the conditions imposed by law. One of those conditions was, that he was to account for the overplus to the owner of the goods; the party pledging, having a right to redeem within a certain time, on paying a rate of interest much exceeding 5 per cent. per annum. Now, it would be unlawful for the plaintiff to take that rate of interest, except in his character of pawnbroker. As long, therefore, as the pawners of the goods had a right to redeem, the plaintiff was clearly carrying on the business of a pawnbroker, and even when he sold the goods, he was bound to account to the owner for the overplus, and therefore, as long as he continued to sell the forfeited pledges, he sold as a pawnbroker. He therefore continued to carry on the business of a pawnbroker at the time when the commission issued. In this case, I am therefore clearly of opinion, that a pawnbroker is a broker within the meaning of the stat. 5 G. 2, c. 30, s. 39, and that the present plaintiff continued to carry on the business of a pawnbroker at the time when the debt of the petitioning creditor accrued. The judgment therefore must be for the defendants.

BAYLEY, J. I am clearly of opinion, that a pawnbroker is a broker within the meaning of the 5 G. 2, c. 30, s. 39. I think that he must have been so considered at the time of passing that act. For Lord HARDWICKE, within a very few years afterwards, considered a pawnbroker to be a person clearly within the meaning of the act. He is certainly within the mischief intended to be remedied. For in the course of his business, he is intrusted with effects of value, for which he is accountable

* Wood, B., and Bayley, J.

to many different persons. From the very nature of his business, therefore, he would be liable to a great many suits, the expense of which might be ruinous to his estate, and detrimental to those who sue him. Now one of the great objects of the bankrupt laws is, to distribute the property of the bankrupt rateably among the creditors, without driving each individual to the necessity of bringing an action. A pawnbroker, therefore, comes within that very description of persons whom the legislature intended to be subject to the bankrupt laws. This case was formerly discussed before the Judges of the Court of Common Pleas at Lancaster; and without attaching any degree of weight to the opinion of one of the Judges who concurred in the former decision, I may say, that, upon that occasion, the parties had the benefit of the judgment, experience, and learning of Mr. Baron Wood, who, after great and careful consideration, gave his deliberate opinion, that it was a case within the words and the spirit of the statute 5 G. 2, c. 30, s. 39. On the other point I cannot entertain any doubt. Part of the business of the pawnbroker is to take in pledges, and hold them in his hands, charging a higher rate of interest for the money he advances than the law in other cases allows; the other part of his business is to sell the pledges, on the joint account of himself and the person by whom the goods were pawned. As long therefore as he continues to sell, he sells in the character of pawnbroker, and continues to be accountable to the proprietors for the value of the goods. If, indeed, we were to hold, that he ceased to carry on the trade of a pawnbroker, when he ceased to take in goods upon pledge, the consequence would be, that any pawnbroker, as soon as he got a large quantity of goods into his possession, might discontinue taking in any more, and afterwards commit an act of bankruptcy without being subject to the bankrupt laws. For these reasons I am clearly of opinion, that a pawnbroker is both within the spirit and words of the statute, and that this plaintiff continued to carry on the business of a pawnbroker at the time when the petitioning creditor's debt accrued.

HOLROYD, J. I am also of opinion that a pawnbroker is a person subject to the bankrupt laws. Lord HARDWICKE's opinion, in *Highmore v. Molloy*, having been delivered within a very few years after the stat. 5 G. 2, c. 30, raises a strong inference that, at that time, pawnbrokers were considered as a species of brokers; and that they, therefore, came within the statute. The 39th section of the stat. 5 G. 2, c. 30, is not merely an enacting clause; but, after reciting "that persons dealing as bankers, brokers, and factors, are frequently intrusted with great sums of money, and with goods belonging to other persons," declares the persons coming within that description to be subject to that and the other statutes made concerning bankruptcy. Lord HARDWICKE's opinion being, that pawnbrokers are a class of brokers, and it appearing by the 39th section of the statute, that brokers are within the provisions of the prior bankrupt laws, I think that a pawnbroker is clearly within the intent of that statute. That being so, then the question is, whether he continued to deal as a pawnbroker at the time when the petitioning creditor's debt accrued. I think that he did continue to deal as a pawnbroker, although he did not continue to deal as such in

all the departments of that trade; he continued, however to sell the pledges, which he was entitled to keep for a particular purpose, viz. that of selling the same, and thereby to derive a greater benefit from the increased interest, by reason of his being a pawnbroker, than he otherwise could by law do. I think that, by continuing to sell these goods with a view to these advantages, he continued to trade as a pawnbroker. For these reasons, I am of opinion that there must be judgment for the defendants.

BEST, J. I am of the same opinion. Although the statute 1 Jac. 1, c. 21, speaks in contemptuous terms of those persons who carry on the business of pawnbrokers, yet it afterwards calls them brokers; for in the 5th section, it is enacted, "that no sale, exchange, pawn, mortgage of any jewel, pledge, &c., to any broker or brokers, or pawn-takers," &c.; and in the 7th section brokers or pawntakers are mentioned. We have, therefore, the authority of the legislature as early as the reign of James the First, to say, that this description of persons were called brokers; and if they are brokers, and in the course of their business, have other men's goods intrusted to their care, they come within the words of the 5 G. 2, c. 30, s. 39. I am, therefore, clearly of opinion, that the plaintiff is a person subject to the bankrupt laws; and I am also of opinion, that he continued to deal as a pawnbroker as long as he did any one act which fell within the range of the business of a pawnbroker. Now, it is part of the business of a pawnbroker to sell the property pledged, if unredeemed, and out of the proceeds to pay himself the amount of the sums he has advanced, and to account for the residue to the person to whom it belongs. During the time he is acting in the character of a pawnbroker, all the legal liabilities belonging to that character attach to him. I think, therefore, that the plaintiff was a broker within the meaning of the stat. 5 G. 2, c. 30, s. 39, and that he continued to carry on the business of a pawnbroker at the time when the petitioning creditor's debt accrued.

Judgment for the defendants.

KNOWLES v. HORSFALL and Others.—p. 134.

A., a spirit merchant, sold to B., a wine merchant, several casks of brandy, some of which, at the time of the sale, were in A.'s own vaults, and others in the vaults of a regular warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided, that this sale had taken place, but no notice of such sale had been given to the warehouse-keeper, with whom some of the casks were deposited. A. having become bankrupt while the brandies remained where they were originally deposited, it was held, that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the 21 Jac. 1, c. 19, s. 11.

TROVER for seventeen pieces of brandy. Plea, not guilty. At the trial before Bayley, J., at the Lancaster Summer assizes, 1819, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

The plaintiff was a wine merchant, at Liverpool, and the defendants were the assignees of one W. Dixon, of Liverpool, wine and spirit merchant, who had been duly declared a bankrupt, upon an act of bankruptcy committed the 17th April, 1819. Dixon bought and imported the brandies in question, being part of a much larger quantity from France, several months before his bankruptcy, and upon their arrival, he entered them in his name in the books of the Custom house and Excise office at Liverpool, and he afterwards bonded them in his name. The brandies, at the time of the action, still remained bonded and entered in his name there. There was no evidence of any express notice having been given by the plaintiff to the excise, of the purchase, and the duties thereon were unpaid. The warehouses in which bonded goods are deposited at Liverpool, lie in different parts of the town, and the bonded goods deposited therein on importation are placed under three locks, one of the customs, one of the excise, and one of the owner or occupier of the warehouse; and in cases where the importer has no bonded warehouse of his own, or not sufficient room in it, it is the usual course of trade at Liverpool to deposit them in the bonded warehouse of some other person on payment of rent. The brandies imported by Dixon were deposited part in vaults occupied by him, at annual rents, and the residue in two bonded vaults of one Ledson, a regular warehouse-keeper in Liverpool. It was notorious at Liverpool, that Dixon had rented warehouses, and that renters of warehouses often take in other persons' goods. All these vaults were under the locks before mentioned. But the merchants' keys of the two vaults occupied by Dixon were kept by him as occupier of such vaults, until the time of his bankruptcy, and are now in the custody of his assignees. In February and March, 1819, Dixon sold to the plaintiff 52 pieces of brandies lying in the vaults rented by him, and seventeen in Ledson's. At the time of each sale, it was agreed, that the brandies should remain in the several warehouses in which they were then deposited rent free, until it suited the convenience of the plaintiff to remove them. Upon each sale, Dixon delivered to the plaintiff samples of the respective brandies, the same being part of the bulk, and regular invoices were made out by Dixon and delivered to the plaintiff, and the latter paid Dixon, before his bankruptcy, for all the brandies, according to such invoices. It was well known in Liverpool, that Dixon had imported the brandy, and that it was in the above-mentioned warehouses; and it was notorious, that he had rented the warehouses, and it was notorious, *in the wine trade*, that these sales had been made to Knowles. Immediately after each sale, the plaintiff caused the letter K. to be marked in chalk on each of the casks, by his warehouseman, according to his usual custom, in all purchases made by him, which mark remained visible on the casks, until after the time of Dixon's bankruptcy. The plaintiff afterwards, and before the bankruptcy of Dixon, resampled all the brandies he had purchased of him. The resampling cannot take place, except in the presence of an officer of the excise, to whom the old samples, or a quantity equal to that of the new sample, is delivered up, and by him put back into the bulk, and he then draws out new samples, and delivers them to the persons applying; it is not necessary for the persons

applying to take the old sample bottles. No entry is made in any book of the name of the person taking fresh samples. The authority upon which the officer of the excise resampled the brandies was an order signed by the plaintiff, but without any authority from Dixon. The order for resampling is filed, but the public have no access to the file, nor would the fact of resampling have prevented Dixon, or any subsequent purchaser from him, removing the brandies, as, if he had paid the duty, the excise would have delivered them to him. Brandies are always entered in the importer's name, and no change of entry is allowed. The plaintiff, before Dixon's bankruptcy, resold 26 pieces of the brandies, part of which were in each of the vaults above mentioned, and which were delivered to the respective purchasers upon such resale; but the orders for the delivery of such of the brandies so resold by the plaintiff, as were in Ledson's vaults, were drawn up by the plaintiff, and signed by Dixon, addressed to Ledson, for delivery of such a quantity specifically as was mentioned in each of those orders; and such of them as were lying in Dixon's vaults, were delivered by him to the several purchasers, on application by the plaintiff to Dixon, without any order. At the time of Dixon's bankruptcy, eighteen pieces of the brandies remained undisposed of, whereof seven were lying in Ledson's vaults, and eleven in the vaults rented by Dixon; but the plaintiff subsequently procured the delivery of one of those in Ledson's vaults, upon an indemnity. The brandies deposited in Ledson's vaults were entered by him in his book, and still remain in the name of Dixon; and it is customary to produce a written order, signed by the person in whose name the brandies stand, before any person can obtain their delivery, and no such order was obtained by the plaintiff as to the brandies in question. At the time of the bankruptcy, the plaintiff could not have got the brandy at Ledson's without an order from the bankrupt; and any other person to whom the bankrupt had given an order would have gotten it, and the bankrupt might have delivered the brandies in his own vaults to any one he had pleased. It is the constant custom at Liverpool, not to rebond goods on any intermediate change of ownership, nor to remove them out of the bond warehouses in which they were first deposited, until such removal becomes necessary, for the purpose of consumption or exportation; but the bond remains with the excise, in the name of the first importer, till it is cancelled, on the payment of the duties by the proprietor who removes the goods out of bond. The brandies in question were regularly demanded by the plaintiff before the action, and refused to be delivered up by the defendants.

Tindal. These casks of brandy were not in the possession, order, and disposition of the bankrupt, at the time of the bankruptcy, within the meaning of the 21 Jac. 1, c. 19, s. 11, for immediately after each sale to the plaintiff, the latter had a mark, denoting the transfer of the property to him, affixed upon the casks, and that distinguished these brandies from others belonging to Dixon. In *Thackthwaite v. Cock*, 3 Taunt. 487, the hops remained undistinguished from the rest of the merchant's stock. Besides, it was notorious to all those carrying on the same trade at Liverpool, that such transfer of property had taken

place; they were the persons most likely to have dealings with the bankrupt, and therefore, he was not likely to acquire that false credit by the possession of the goods which the statute was intended to prevent. It was notorious, also, at Liverpool, that sales take place whilst the goods are bonded; and it was the custom at Liverpool, not to re-bond or remove goods out of the warehouse, upon an intermediate change of property, until such removal becomes necessary, for immediate consumption or exportation. A purchaser, who must be taken to be aware of such a custom, had no right to assume, from the fact of the goods having continued in the possession of the bankrupt, that the property had not been changed. In *Flinn v. Mathews*, 1 Atkyns, 185, the bankrupt, on the 8th of July, had sold a certain quantity of tar, then lying on the quay at Liverpool, which tar was to be shipped to Ireland, and it was agreed that the tar should be lodged in a warehouse, until the vendee should have an opportunity of shipping it off. The bankrupt placed the tar in a cellar of his own, and became bankrupt in the beginning of August. Lord HARDWICKE was of opinion, that this was not a case within the statute, for it was merely a temporary custody, because the vendee had not an opportunity of selling it, by shipping it off immediately to Ireland. That case is an authority in point, for here, the bankrupt had only a temporary custody of the goods, viz., until the plaintiff had an opportunity of selling them; and the period that elapsed in this case between the sale to the vendee and the bankruptcy of the vendor, does not much exceed the time that elapsed between those events in *Flinn v. Mathews*.

Parke, contrà, was stopped by the Court.

ABBOTT, C. J. I am clearly of opinion that all these brandies were, at the time of the bankruptcy of Dixon, in his possession, order, and disposition, by the consent and permission of the true owner, within the meaning of the 21 Jac. 1, c. 19, s. 11. It appears, upon the facts stated, that some of the casks remained in the vaults of Dixon, the original seller, and that the others were in the vaults of Ledson, a warehouse-keeper. As to the latter parcel, if the plaintiff had given notice of the sale to the warehouse-keeper, the latter would not then have been justified in delivering them to any other order than that of the plaintiff, but not having received any such notice, the warehouse-keeper would have been justified in delivering them to the order of Dixon, who had placed them there. It is clear, therefore, that that parcel of goods remained, after the sale, subject to the order and disposition of the bankrupt. With respect to the brandies which remained in his own vaults, the case is much stronger; because, as to them, Dixon united in himself the character of warehouse-keeper and that of merchant or dealer in the commodity. Any person who went for the purpose of purchasing these brandies, could not know that Dixon did not continue the owner. He had the corporeal power over them. The letter K. marked on the casks might speak a language, to a certain class of persons, intelligible; but to others who might be induced to become the creditors of Dixon, in the belief that the brandies belonged to him, it would be wholly unintelligible. If any person of the latter description had purchased them of the bankrupt, I have no doubt that

he would have had a good title to them, as against the plaintiff; for the real owner ought not to have left the goods, after the purchase, in the hands of Dixon, and suffered him to treat them as his own. For these reasons, I am of opinion, that there must be judgment for the defendants.

BAYLEY, J. This is a very clear case. Some of the casks were in the vaults of Ledson, and others in vaults rented by Dixon. As to the former parcel, it appears that Ledson would not deliver them to the order of any other person than that of the bankrupt. Those goods, therefore, were clearly in the possession, order, and disposition of the bankrupt. It was necessary, that something should be done to make the change of property notorious to the public at large, or at least to those persons who were likely to trust the bankrupt, upon the faith of his having the property in these goods. It is not sufficient, that it should be known only to persons in the same trade. Now, as to the brandy which remained with Ledson, there was nothing done to make the change of property notorious. The other parcel of brandy remained in Dixon's own vaults, so that if any person who was not in the wine trade at Liverpool, had gone to Dixon to purchase it, he would have had the power of selling and delivering it to such person. Now, when the original proprietor of goods continues to have the power of sale and delivery, he has the property in his possession, order, and disposition, within the meaning of the statute.

BEST, J. This case comes directly within all the words of the statute, for here the bankrupt had the possession, order, and disposition of the brandies, with the consent of the true owners. According to the facts stated, the goods would not have been delivered to any other order than his; he therefore had the power of sale and delivery, and that brings the case within the very words of the act of parliament. The case of *Flinn v. Matthews*, 1 Atkyns, 185, is distinguishable from the present, because the goods there were to be left in possession of the bankrupt only till they could be conveniently shipped. In this case, the brandies were to remain in the bankrupt's warehouse till the plaintiff could sell them, and they had in fact continued there for a considerable time. It is not sufficient that the sale was known to persons in the wine trade at Liverpool. The transfer of the property ought to have been known to all other persons who might, in consequence of the bankrupt's continued possession of it, have been induced to give him credit. In the case of *Thackthwaite v. Cock*, 3 Taunt. 487, it was decided by the Court of Common Pleas that "a custom that purchasers of hops from hop merchants should leave them in the merchant's warehouse for the purpose of resale upon rent, undistinguished from the merchant's stock, was not such a custom of trade as would prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition." That case is an authority to show, that the present plaintiff is not entitled to recover, and consequently there must be judgment for the defendant.*

Judgment for the defendant.

* Holroyd, J., was absent at Chambers.

DOE on the Demise of ROBINSON v. ALLSOP.—p. 142.

Where there were two assignments of the same lease of premises within the county of Middlesex, and that executed last was registered first: *Held*, that the deed last registered must, in a court of law, be considered as fraudulent and void, in consequence of 7 Anne, c. 20, s. 1, although the party claiming under the second assignment had full knowledge, when it was executed, of the prior execution of the first assignment.

EJECTMENT, to recover certain premises in the parish of Saint Mary-le-bone, in the county of Middlesex. Plea, general issue. The cause was tried before Abbott, C. J., at the Westminster sittings after Michaelmas term, 1820; when a verdict was found for the plaintiff, subject to a special case upon the following facts. The demise was laid on the 2d day of March, 1818. By lease dated the 30th day of March, 1813. the premises in question were demised by Matthew Wood to George Stoddart, since deceased, for a term of 88 years. This lease was prepared by the then attorney of Stoddart, and left by Stoddart in his possession. About this time, the plaintiff, Robinson, paid large sums of money for, and on account of Stoddart, and by his desire also, paid a sum of 13*l.* 14*s.* 6*d.* for, and obtained the possession of the lease from the attorney who had prepared it, and with whom it had been left. On the 29th October, 1813, upon a settlement of accounts between Stoddart and Robinson, Stoddart gave to Robinson an acceptance for 83*l.* 5*s.*, which was then due to Robinson, in addition to the former sum, 13*l.* 14*s.* 6*d.*, and in the month of February, 1814, Robinson further paid on account of Stoddart 70*l.*, and put into an auctioneer's hands the lease to be sold by public auction. At the sale, no person bidding sufficiently high for the premises, they were bought in, and the lease delivered back to Robinson. By indentures of the 25th day of July, 1814 in consideration of 190*l.*, Stoddart assigned the lease and premises to one Jeremiah Moore for all his term therein, but the lease remained in Robinson's possession. On the 4th day of November, 1815, Stoddart was discharged from the King's Bench prison, pursuant to an order of the Court for the relief of insolvent debtors, and, upon his discharge, by indenture bearing date the 4th day of November, 1815, assigned all his estate, property, and effects in possession, remainder and reversion, to the provisional assignee of the insolvent debtor's court. This assignment was registered in the register office, in the county of Middlesex, on the 7th day of October, 1818. In the schedule of the said insolvent's estate, property and effects, filed in court, and which accompanied the assignment to the provisional assignee of the Court, the lessor of the plaintiff, Robinson, was stated and returned as a creditor of the insolvent, and the premises in question were stated to have been mortgaged or conveyed, and then to be in mortgage and conveyed for 60*l.* to a Mr. Barton Greenwood, and also to the said Jeremiah Moore. On the 19th day of December, 1815, Moore put the premises up to sale by public auction. The auctioneer had not the original lease, which was at that time in Robinson's possession, but Robinson knew that he was about to sell the premises, and desired the auctioneer, if they went for a cer-

tain price, to buy them in for him. The premises, however, exceeded Robinson's price, and they were finally bought by one William Barton, and the auctioneer sometime afterwards told Barton, that if Robinson was paid 30*l.* he would give up the lease, but Barton refused. On the 31st day of July, 1817, the plaintiff, Robinson, as one of the creditors of Stoddart, took an assignment from the provisional assignee of Stoddart, of all the insolvent's estate and effects, and the 7th October, 1818, registered the original lease of the 30th day of March, 1813, and also, at the same time, registered the assignment to the provisional assignee, and the assignment from the provisional assignee to him, dated the 31st of July, 1817, and brought an ejectment against the then tenant in possession, in Michaelmas term, 1819, but was nonsuited by reason of his not being able to prove the discharge of Stoddart under the insolvent debtors' act by the regular proof. On the 9th June, 1819, William Barton assigned the premises to the present defendant, George Alexander Allsop, for the term therein, and the plaintiff, Robinson, brought the ejectment against the present defendant, who appeared as landlord. The assignments by Stoddart to Moore of the 25th July, 1814, and assignment from Moore to Barton of the 13th July, 1816, were not registered until the 27th day of February, 1819.

Holt, for the plaintiff, contended, that a subsequent purchaser for a good consideration, having registered his title first, was to be preferred before the prior purchaser. By 7 Anne, c. 20, s. 1, all unregistered conveyances are to be adjudged fraudulent and void against subsequent purchasers for valuable consideration. That is decisive of the case. As to the knowledge of the prior conveyance, it can make no difference at law. All that it can do, is perhaps, to entitle the defendant to relief in equity.

Abraham, contra. The object of the act of parliament was to prevent frauds by secret conveyances.—That is expressed to be its object in the preamble. Now, in the present case, there is clearly no fraud, for the fact of the existence of the prior conveyance was known to the subsequent purchaser. This, therefore, is not within the mischief intended to be remedied by the act. In *Cheval v. Nichols*, 1 Str. 664, this was the view taken by the Court of the act. And in *Worsley v. Demattos*, 1 Burr. 467, Lord MANSFIELD puts the case of the subsequent purchaser with the knowledge of a prior unregistered conveyance, as a fraudulent act on the part of the former. He also cited *Le Neve v. Le Neve*, 3 Atk. 646.

ABBOTT, C. J. A court of law is now called upon for the first time, to put a construction on words of this statute, by which it is enacted, that every deed or conveyance that shall, after the 29th September, 1709, be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser, or mortgagee, for valuable consideration, unless a memorial thereof be registered before the registering of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim. Now it is impossible, that plainer words could be used, and I think that sitting in a court of law, we are bound to give effect to them, and that we cannot say, that this deed is not fraudulent and void within the meaning of this act, because.

possibly it may turn out upon examination, that the defendant is entitled to some relief in equity. If there be any such ground, a court of equity may interfere, and this case shows clearly how inconvenient it would be, if this Court were to enter into any equitable considerations. For here, it is clear, that the lessor of the plaintiff had at all events a lien on the instrument of conveyance. What effect that might have on a court of equity, I cannot say, but I think it at least is a fit matter for its consideration. We, however, in a court of law, must give effect to the word of the act.

BAYLEY, J. I am of the same opinion. The words of the statute are, that such deeds or conveyances shall be adjudged fraudulent and void against every subsequent purchaser for valuable consideration. It is to be observed, that the words "bona fide purchaser" are not used. I think, therefore, that we are bound in a court of law to give effect to these words. That seems to have been the opinion of the judges in the cases cited, although they thought that a court of equity would, in some cases, interfere to relieve the party. It is so laid down by Lord HARDWICKE, in *Le Neve v. Le Neve*, and the words of Lord MANSFIELD, in *Doe v. Routledge*, Cowp. 712, are these: "Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside, because he has that notice which the act of parliament intended he should have." He therefore puts it as a case in which equity would interfere; and the circumstances of the case shows the propriety of our adhering to the words of the act; for I am by no means clear that we should not work great injustice, if we were to decide in favour of the defendant.

BEST, J.* The words of this statute are quite clear, and in the absence of any case, I should think the plaintiff entitled to judgment. But it seems to me that the case of *Le Neve v. Le Neve*, in which Lord HARDWICKE considers the party under these circumstances as entitled to relief in equity, is an authority to show, that at law he is without defence.

Judgment for the lessor of the plaintiff.

* Holroyd, J., absent at Chambers.

GOODE and BENNION v. HARRISON.—p. 147.

(In Error.)

Where an infant held himself out as in partnership with I. S., and continued to act as such till within a short period of his coming of age; but there was no proof of his doing any act as a partner after twenty-one: *Held*, that it was his duty to notify his disaffirmance of the partnership on arriving at twenty-one; and as he has neglected to do so, that he was responsible to persons who had trusted I. S. with goods subsequently to the infant's attaining twenty-one, on the credit of the partnership.

WRIT of error from the Court of Common Pleas at Lancaster. The original action was brought by Harrison against Goode and Bennion, as partners, to recover the amount of a certain bill of exchange for 187*l.* 12*s.* There were also other counts for goods sold and delivered. The

only question made was as to the liability of Bennion. At the trial, at the Lancaster Summer assizes, 1819, before Bayley, J., the counsel for the defendant, Bennion, tendered a bill of exceptions to the learned Judge's direction to the jury, which bill of exceptions stated the following facts, viz.: that upon the trial the counsel for Harrison, to maintain their issue, gave in evidence that John Goode and Bennion, in April, 1818, called upon one James Fair, a broker, at Manchester; that Goode introduced Bennion to Fair as a friend of his from Liverpool, and said, "We want goods:" that Fair went with them to Harrison and other houses in Manchester, and introduced them to Harrison as the firm of Goode and Bennion; that they bought goods of Harrison to the amount of 130*l.*, and from several different other persons fifteen parcels, to the amount altogether of 1590*l.*, and Fair transmitted copies of the invoices of the goods, directed to Goode and Bennion, Liverpool, some of which were made out to the firm of Goode and Bennion, others to John Goode and T. Bennion; that some of the original invoices were seen by them in Fair's counting-house, and the goods were forwarded to the address of Goode and Bennion, and remittances came back: that when Goode and Bennion were in Manchester, in April, 1818, Goode, in the hearing of Bennion, said, that if the goods they then bought would answer the purpose, in a very short time they would have 500 pieces of one sort and 500 of another sort; that after this Fair corresponded with the firm of Goode and Bennion: that in April, 1818, Goode and Bennion had a counting-house in Liverpool; that the name of Goode appeared on the private door, and remained there till August, 1819, but the name of Bennion did not appear at all on the counting-house: that Goode had been sometime in the counting-house before this transaction of Goode and Bennion, but had not shipped goods before: that in the beginning of January, 1819, Fair received a letter, in the hand-writing of Goode, ordering goods, of which the following is a copy: "Liverpool, January 4th, 1819. My dear Sir, Though we have not yet received the promised detained accounts from America, we are anxious that all the opportunity of cheap purchasing may not go past. We, therefore, authorize you, if the terms are about the same, to purchase for N. York, from 300*l.* to 500*l.* of the most saleable articles, to secure which more fully, we wish the greatest extent of credit mentioned in your letter. I am, for G. and B., very respectfully, yours, John Goode." That Fair, in consequence thereof, bought goods from Harrison to the amount of 187*l.* 12*s.*, having no reason to suppose that the connection between Goode and Bennion was put an end to, and forwarded the goods, and also a bill of parcels for the same, to the direction of Goode and Bennion, and that on the 16th January, 1819, Harrison drew a bill of exchange for the amount of those goods upon Goode and Bennion, which bill of exchange the said John Goode accepted in the name of Goode and Bennion, and which was the bill of exchange mentioned in the first count of the declaration: that Fair did not see Bennion from the time of his being in Manchester, in April, 1818, till the month of February, 1819, at which time Bennion asked Fair for

the account current of Goode and Bennion for goods bought when he and Goode came to Manchester, in April, 1818, and said, at the same time, that the transaction in April, 1818, was the only one that he was engaged in with Goode, and that all that account should be paid. That at the time of the purchases in April, 1818, Bennion did not say, that he was only going to enter into one adventure with Goode: that the said goods, so first purchased from the said plaintiff, and others, were paid for before the commencement of the action, and that Goode is since become a bankrupt. And the counsel for Harrison, to maintain the said issue, further produced, and gave in evidence the bill of exchange, and also a certain letter in the hand-writing of Bennion, addressed to Fair, as follows: "Liverpool, 20th April, 1819. Dear Sir, We shall be obliged by your purchasing for our account 100 pieces of the fancied bordered gingham dresses, well assorted, and the remaining part of 100*l*. in fancy muslin bordered dresses, well assorted cash prices, and request that they may be sent as soon as possible per wagon. I remain, dear Sir, for Goode and self, yours, T. Bennion. P. S. Please be very particular in the selection." And thereupon the counsel learned in the law for the said Thomas Bennion, in order to support the issue on his part, gave in evidence, that Bennion was born on the 29th May, 1797. And he also further gave in evidence by one Riley, that the said Riley was five months in the employ of Goode, previously, and at the time of the first purchase, and that he kept the books, and that Bennion was never a partner with Goode to the knowledge of Riley. Riley further proved, that he went to Barbadoes with the goods purchased in April, 1818. That he sailed on the 30th April, 1818, and returned on the 5th September, 1818. That after the 5th September, 1818, Goode and Bennion communicated as private friends, but not in the way of business, and that he, Riley, never knew Bennion's name to be used in the purchase of goods after April, 1818. That whilst Riley was absent, he addressed and sent a letter to the said Goode and Bennion at Liverpool, relative to the said goods so shipped in the name of Goode and Bennion. That Riley sometimes saw Bennion at the counting-house, but had no communication with him on business before he went, or after he returned. And the said counsel for the said Thomas Bennion, did then and there insist before the said justice, on behalf of the said Thomas Bennion, that the said several matters so produced and given in evidence, on the part of the said Thomas Bennion as aforesaid, were sufficient, and ought to be admitted and allowed as decisive evidence, to entitle the said Thomas Bennion to a verdict, and to bar the said Thomas Harrison of his action against the said Thomas Bennion. And the said counsel, for the said Thomas Bennion, did then and there pray the said justice, to admit and allow the said matters so produced and given in evidence for the said Thomas Bennion, *to be conclusive evidence in favour of the said Thomas Bennion, to entitle him to a verdict*, and to bar the said James Harrison of his said action, against the said Thomas Bennion, and to direct the jury accordingly. But to this, the said counsel learned in the law, of the said James Harrison, did then and there insist before the said justice, that the same were not sufficient, nor ought to be admitted or allowed to entitle the said Thomas

Bennion to a verdict, and to bar the said James Harrison of his said action against the said Thomas Bennion, and thereupon, the said justice stated his opinion to the jury to be, that a fraud had been committed by the said John Goode, and that where one of two innocent parties was to suffer, he ought to do so whose negligence occasioned the loss. That an infant may, in point of fact, be a partner, and sue as a partner on a contract, though he is not liable to the partnership creditors. That in April, 1818, the said Thomas Bennion held himself out as a partner with the said John Goode, and to the said James Harrison in particular, and that after he came of age, in May, 1818, he should have given notice of his dissent to the said partnership, or that he would be no longer liable as a partner, which he might easily have done. That he knew, he would be supposed by the said James Harrison still to continue a partner, and that he was negligent in not putting a stop to that delusion. That if an infant, shortly before he becomes of age, represents himself as a partner, he ought to take care to notify, that he is not so when he comes of age, as he facilitates the commission of a fraud. That though the payment, after the infant came of age, was not sufficient to confirm the partnership, yet as there was in this case an actual partnership between the said John Goode and the said Thomas Bennion, and inasmuch as the said Thomas Bennion might have prevented the said James Harrison from being deceived, if he had given notice of his dissent to the partnership, or that he would be no longer liable as a partner, he ought to be liable to the said James Harrison, and that in effect, by his omission to do so, he suffered the said John Goode to pledge his, the said Thomas Bennion's credit, to the said James Harrison, after he came of age, and, with that direction, left the same to the said jury, and the said jury then and there gave their verdict for the said James Harrison for, and assessed the aforesaid damages at 188*l*. 18*s*. damages. Whereupon the counsel for the said Thomas Bennion excepted to the aforesaid opinion of the said justice, and did insist on the several matters and things aforesaid, as a bar to the said action, and that an infant cannot be a legal partner, and that, when the said Thomas Bennion came to the age of 21 years, there was no necessity for him, nor was he bound by the law to give notice of his dissent to the partnership, or that he would be no longer liable as a partner, in order to avoid the liability of a partner. And that, as the said Thomas Bennion, in April, 1818, was an infant, he was not a legal partner, and therefore, no notice was necessary to be given by him of his dissent to the partnership, or that he would be no longer liable as a partner, and inasmuch as the said several matters, so produced and given in evidence on the part of the said Thomas Bennion, and objected and insisted on as a bar to the said action, do not appear by the record of the verdict aforesaid, the said counsel for the said Thomas Bennion did then and there propose their aforesaid exceptions to the opinion of the said justice, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said Thomas Bennion as aforesaid, according to the form of the statute in such case made and provided, and thereupon the said justice, &c.

Littledale, for the plaintiff in error. In this case Bennion was not liable: he can only be liable as a partner, not having himself personally interfered in ordering the goods. Now, admitting that what passed with Fair at Manchester was sufficient to make him liable as a partner, in case he had then been of age, it is clear here that no act has been done by him since his coming of age to affirm the partnership; and the case ought not to have been left to the jury, as if it was the duty of the infant, upon coming of age, to disaffirm the partnership. In *Holmes v. Blogy*, 1 B. Moore, 466, it was a question arising out of a lease. Now, a lease may be for an infant's benefit, and an interest passes by it; and, therefore, it is for him to disaffirm it after he comes of age, or otherwise it will bind him. But a partnership is, in contemplation of law, not for his benefit; and, therefore, if nothing be done after he comes of age to affirm it, it is at an end. An infant cannot be a bankrupt. His trading is not a thing recognised by the law; and it cannot, therefore, be necessary for him to give a regular notice to the creditors that such a trading has been put an end to; nor will the law presume that he commits a fraud in not doing so. In *Jennings v. Rundall*, 8 T. R. 335, the infant was held not to be liable; because, although the action was framed in tort, it was in reality founded on a contract. An infant is indeed liable to an action for slander, assault, or anything connected with crime; but not for anything founded on a contract. Now, in order to make out the partnership, certain contracts are proved: for each of these acts, separately, the infant is not responsible. How, then, can the partnership, which is the aggregate of these acts, be binding upon him?

Parke, *contrâ*. The case does not go on the ground of any supposed continuance of the contract of partnership between Goode and Bennion, after the latter came of age, but is founded on grounds altogether distinct. Here, Bennion permitted himself to be held out to the world as a partner, and so induced persons to believe that Goode had authority to bind him; and there are many cases depending upon the principle, that where an individual chooses so to act, he makes himself responsible. In *Monk v. Clayton*, cited in 10 Mod. 110, the act of a servant, though out of place, was held to bind the master, by reason of the former credit given him by his master's service; and the same principle applies to the present case. Here the infant was introduced as a partner; and the conversation with Fair, and his own letter, dated 20th April, 1819, are abundantly sufficient to show, that up to a very short period before his coming of age, he represented himself as a partner. He must, therefore, be held responsible, upon the principle, that where one of two innocent parties is to suffer by the fraud of a third, he ought to suffer who has been the cause why the credit has been given.

Littledale, in reply. The case of master and servant is distinguishable. There, the master had originally power to authorize the servant to contract; but the infant never could give such authority to his partner. In Viner's Abridgment, tit. *Enfant*, H. 2, pl. 16, it is thus laid down, "Case lies not against an infant for affirming himself to be of age, and thereby borrowing money of the plaintiffs; and a distinction

was taken between torts and contracts of infants; for though infants shall not be bound by contracts, yet they shall be bound for torts. But, *per Curiam*, though infants shall be bound by actual torts, as trespasses which are *vi et contra pacem*, yet they shall not be bound by those which sound in deceit." That is, therefore, a direct authority in point.

ABBOTT, C. J. I am of opinion that, in the present case, the judgment ought to be affirmed. By the bill of exceptions, it appears, that at the trial it was insisted that the matters given in evidence were conclusive, and ought to have entitled the defendant to a verdict; and that the learned Judge should have directed the jury accordingly. The question now is, if the evidence so proved was conclusive, and if the learned Judge ought so to have informed the jury? I think the evidence was not conclusive, and that it was not the duty of the learned Judge so to have informed the jury. No doubt Bennion, whilst under 21, had been a partner, and had held himself out as such to many persons, and amongst others, to the plaintiff. Upon his coming of age, he does nothing. He indeed ceases to act as a partner, or to purchase goods; but he gives no notice to any body that he has so ceased. Then, it is insisted in his behalf, that as all he did in the character of a partner was done in his infancy, this was not necessary; and that he is not liable, unless it be affirmatively shown that he was a partner with Goode after he came of age. But a person may be sued as a partner who never was in reality a partner. If once a person holds himself out as being a partner, till he gives notice that he has ceased to be so, those who deal with the firm upon the faith of the supposed partnership may consider him as such, and he is bound by that representation. It is not necessary in fact, or in law, that to create a legal obligation a partnership should be still continuing. The legal obligation may arise from the acts of the party at one time, and his forbearance at another time. Here, during infancy, the defendant acts as a partner, and when he comes of age he forbears to inform the world that he was not so. Then the question is, if the Judge ought to tell the jury that it was a matter upon which they were to deliberate? I think the learned Judge acted most correctly in leaving it to their decision, and leaving it with a strong intimation of his opinion against the claim of exemption set up by the defendant. The judgment, therefore, of the Court of Common Pleas at Lancaster must be affirmed.

BAYLEY, J. If I had seen any ground for changing the opinion I delivered at the time of the trial, I should be very glad in having the opportunity to correct it now; but, in this case, I still think the present plaintiff entitled to recover, and that the infancy of Bennion was no bar to the action. It is clear that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy; but still he may be a partner. If he is, in point of fact, a partner during his infancy, he may when he comes of age, elect if he will continue that partnership or not. If he continues the partnership, he will then be liable as a partner; if he dissolve the partnership, and if, when of age, he takes the proper means to let the world know that the partnership is dissolved, then he will cease to be a partner. But the founda-

tion of my opinion is the negligence of Bernion at the time he became of age. Suppose an infant is not really a partner, and that, during his infancy, he never in fact enters into any joint purchase, but that he holds out to different people, "I am a partner with A. B.," and then comes of age. Suppose, also, that the person to whom he made the representation furnishes A. B. with goods, A. B. representing himself to be a partner with the infant, and the latter having done nothing to correct the mistake and apprehension in the mind of the seller of those goods. I should think, in such a case as that, the infant, the person who, when he was an infant, had represented himself as being a partner with A. B., would, by suffering that delusion to continue when he became of age, and neglecting to set the matter right, be liable to all those persons upon whom the delusion operated. That is the justice, and, as it seems to me, the law of the case. It would be very hard if the persons who had sold the goods should not have the benefit of the credit pledged; and the individual, when he came of age, may protect himself from the consequence of that misrepresentation by giving notice to all the persons to whom he has made the false representation. For these reasons I think the judgment ought to be affirmed.

HOLROYD, J. I think, also, that the judgment ought to be affirmed. Although an infant, entering into partnership with other persons, is not responsible for the debts contracted during his infancy, while he is so a partner; yet he may by law be a partner, and be entitled to all the benefits resulting from the partnership, though he will not be liable for the losses, if he chooses to take advantage of his infancy. Here, a partnership was formed; and it appears by the letter of the 20th April, 1818, written by the defendant himself, that that partnership continued up to that time, which was within a very short period of his attaining the age of 21. There was, I think, sufficient evidence for the jury to draw the conclusion that the partnership continued until he came of age: and if there was a partnership continuing when he came of age, that partnership must be taken still to have continued till something was done to dissolve it; and no notice being given by the infant to dissolve the partnership, all the consequences of law result from it, one of which is, that a partner at age is responsible for all the debts contracted by the firm after he came of age. I think that the defendant is liable, and that the judgment ought to be affirmed.

BEST, J. I am of the same opinion; and I think that the direction of the learned Judge was perfectly correct. The fallacy of Mr. *Litledale's* argument, I think, arises from this circumstance: he considers the contract of an infant as absolutely void from the beginning. But it is not void; for if void, the infant himself could take no advantage of it. It has however been decided that an infant may be a partner, and may take advantage of a partnership contract. Here, the infant, by holding himself out as a partner, contracted a continual obligation; and that obligation remains till he thinks proper to put an end to it. He continued that obligation when he became of age, when he became capable of managing his own concerns; and if he wished to be understood as no longer continuing as a partner, he ought to have notified it to the world. Not having done so, I think that contract, which

was voidable only in the first instance, became absolute as against him. I am of opinion that when he in the month of April, had distinctly stated to the person to whom that letter was written, that he was not a partner in a particular transaction, but a general partner, and directed goods to be purchased for the concern, the world had a right to take him to be a partner till he thought proper to put an end to it; and if, after he became of age, he allowed the delusion to go on, inducing the world to believe that the partnership was continuing, he must, like every other man, take the consequence. It seems to me, on the principles of honesty as well as by the rules of law, this judgment ought to be affirmed.

Judgment affirmed.

PHILLIPS and Another v. BARBER.—p. 161.

Where, in an action on a policy of insurance on ship, in the usual form, for twelve months, at sea and in port, the loss averred was as follows: that the ship having arrived at the harbour of St. J., and discharged her cargo, it became necessary to place her, and she was accordingly placed in a graving-dock, there to be repaired, and near to a certain wharf in the graving-dock; and that, whilst she was there, by the violence of the wind and weather she was thrown over on her side, whereby she struck the ground with great violence, and was bilged, &c.: *Held*, that this was a loss within the general words of the policy, "all other perils, losses, and misfortunes," &c., for which the underwriters were liable.

Held, also, that the above facts, with the additional circumstance of there being two or three feet water in the graving-dock when the accident happened, did not amount to a loss by perils of the sea.

DECLARATION on a policy of insurance, in the usual form, on the ship *Susannah*, for twelve months from the 20th February, 1820, to the 19th February, 1821, both days inclusive, *at sea and in port*. The loss was alleged in the first count of the declaration as follows: And the said plaintiffs further say, that heretofore and during the continuance of the risks in the said writing or policy of insurance mentioned, and thereby insured against, to wit, on the 1st day of October, 1820, aforesaid, the said ship arrived at the harbour of the city of St. John, in the province of New Brunswick, and then and there discharged a certain cargo, with which the same was then stored, and loaded, and thereupon it then and there became necessary to take and place, and the said ship was then and there accordingly taken and placed in a certain graving-dock there, in order that the same might be repaired and amended, and rendered fit to proceed on her then intended voyage. And the said plaintiffs further say, that the said ship was then and there placed near to a certain wharf in the said graving-dock, and that afterwards, and during the continuance of the risks in the said policy of insurance mentioned, to wit, on &c., and whilst the said ship was lying against the said graving-wharf, so placed there as aforesaid, the same, by the violence of the wind and weather was with great

force and violence blown over on her side, whereby the said ship was thrown upon and struck the ground with great violence, and thereby, then and there was bilged, strained, shattered, and greatly injured, damaged, broken, and spoiled, and it, thereupon, then and there became expedient and necessary to sell and dispose of the said ship, and the same was then and there accordingly sold at the said port of St. John aforesaid, and by means of the premises aforesaid, the said Daniel Phillips sustained an average loss, to wit, an average loss of 764*l.* 6*s.* 6*d.* upon and in respect of the said ship, to wit, at, &c., and thereby, and according to the form and effect of the said policy of insurance, and his promise and undertaking, the said defendant then and there became liable to pay and ought to have paid to the said plaintiffs a certain sum of money, to wit, the sum of 84*l.* 18*s.* 6*d.* of like lawful money, being his the said defendant's proportion of the said average loss for and in respect of the said sum of 100*l.*, so by him insured as aforesaid. The second count alleged the loss by perils of the sea generally. To the first count, the defendant demurred specially, assigning for cause of demurrer, that it was not stated that the ship was at sea or in port when the loss thereof happened, and that the nature of the said graving-dock was not stated, nor did it appear whether, at the time of the loss, the ship was in the water or on dry ground, nor that the loss happened from any peril insured against by the policy, nor that the said ship might not have been repaired at the said city of St. John, nor how it was necessary to sell the same, nor how much the sale thereof produced, and that the loss, as stated, was in its nature not an average but a total loss, with benefit of salvage to the underwriters, and was alleged without sufficient certainty and precision. And as to the other count, he pleaded the general issue.

Campbell, in support of the demurrer. This was not a loss for which the underwriters were liable, being a mere accident, happening to the ship whilst under repairs. The loss is clearly not one of the perils enumerated in the policy. Nor will the general words at the end be sufficient to include the case; for those words apply only to perils ejusdem generis with those enumerated. Suppose the ship damaged by worms, or that rats made holes in the bottom, and so the loss happened: it is clear, that in such cases, the underwriters would not be liable. In *Thompson v. Whitmore*, 3 Taunt. 227, the loss alleged in the declaration was by the waves, winds, and perils of the sea. And, in truth, the waves there actually caused the loss; for they washed away the supports of the vessel, in consequence of which she was damaged. But the Court there held it not to be a loss by perils of the sea. On that occasion, the case of *Rowcroft v. Dunsmore* was cited and relied on, where Lord KENYON held, that a loss occasioned by the ship's not being able, when hove down, to bear the strain, and in consequence, being drawn on the land, where she bilged, was not a loss by perils of the sea. He also cited *Pelly v. The Royal Exchange Assurance Company*, 1 Burr. 841. Besides, it is not distinctly alleged that this loss happened in port.

Chitty, contra, was stopped by the Court.

ABBOTT, C. J. I am of opinion, that the plaintiff is entitled to recover. In this case he has not entangled himself by any particular allegation, but has shown fully the manner, time, and place of the loss. This, it is to be observed, was a policy upon the ship for time at sea and in port. Now, the loss stated in the declaration was, that after the ship had discharged her cargo at the harbour of St. John, she was then and there placed in a certain graving-dock there, for the purpose of repair, near to a certain wharf, and that whilst she was lying there. she was, by the violence of the wind and weather, blown over on her side, and damaged, so that it became necessary to sell her. Now, I think that it is clearly alleged that this was a loss happening in port. And then the question will be, whether it is a loss falling within any of the perils insured against. Now, the perils insured against are of the seas, men of war, fire, &c., and of all other perils, losses, and misfortunes that have or shall have come to the hurt, detriment, or damage of the said ship. These general words are, indeed, restrained in construction to perils ejusdem generis with those more particularly enumerated in the policy. In this case, however, the loss was occasioned by the violence of the wind and weather in port; and it seems to me, therefore, to have been produced by a peril ejusdem generis with those specified, and to fall within the general words of the policy. There must, therefore, be judgment for the plaintiff.

Judgment for the plaintiff.

On the first day of term, *Scarlett* moved to enter a verdict for the plaintiff on the second count, averring a loss by the perils of the sea. The facts given in evidence at the trial were the same as those stated in the first count of the declaration, with the addition, that there was between two and three feet depth of water in the graving-dock at the time the ship was blown over. He cited *Fletcher v. Ingalls*, 2 B. & A. 315, as an authority in point. But the Court were of opinion, that this was not a loss by the perils of the sea; and they added, that the case cited was clearly distinguishable; for the ship there was in the ordinary course of her voyage when the damage happened, which was not the case here.

Rule refused.

MURRAY v. KING.—p. 165.

The condition of a bond, after reciting that defendant and J. S. had delivered and endorsed to the plaintiff a bill of exchange, drawn by J. S. and accepted by A. B., was, that defendant and J. S., or either of them, their heirs, &c., should pay, or cause to be paid, to the plaintiff, his executors, &c., the sum secured by the bill, within one month after it should become due and payable, in case it should not be then paid by the acceptor, to the plaintiff, his executors, &c., according to the tenor of the said bill, together with interest from the time the bill became due: *Held*, that to an action on this bond, it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and J. S., or either of them.

DEBT on bond The defendant craved over of the bond and condi

tion, which recited, that W. B. Tufnell and the defendant had delivered and endorsed to the plaintiff (who had discounted the same) a bill of exchange, drawn by Tufnell on, and accepted by, one Tyrell, dated January 14th, 1819, for the sum of 1300*l.*, payable 12 months after date, for value received, and payable to Tufnell, or his order; and it then provided, that if Tufnell and the defendant, or either of them, their heirs, &c., should pay or cause to be paid to the plaintiff, his executors, &c., the said sum of 1300*l.*, within one month after the said bill of exchange should become due and payable as aforesaid, in case the said sum of 1300*l.* should not be then paid by Tyrell to the plaintiff, his executors, &c., according to the tenor of the said bill of exchange, together with interest for the same from the time that the said bill of exchange should have become due and payable, then the obligation should be void, &c. The defendant pleaded firstly, non est factum; secondly and thirdly, that the bond was given for usurious consideration, upon which pleas issues were joined; and, fourthly, that the plaintiff, when the bill of exchange in the bond mentioned became due and payable, did not duly present, or cause to be presented, the said bill of exchange to Tyrell, for payment thereof, according to the usage and custom of merchants, but wholly neglected to present the said bill for payment for a great and considerable time, to wit, until one month had elapsed after the said bill of exchange became due and payable, according to the tenor thereof; and, fifthly, that after the bill of exchange became due and payable, and according to the tenor and effect thereof, to wit, on, &c., at, &c., the said bill was presented to Tyrell for payment thereof, and payment required, but that Tyrell neglected and refused to pay the same, and that the plaintiff did not give, or cause to be given, notice of the non-payment of the bill to the defendant, or to Tufnell, in a reasonable time after the bill become due. To the fourth plea, the plaintiff replied, that the acceptance of the bill of exchange by Tyrell was a forgery; and that the defendant and Tufnell, long before the said bill of exchange become due, to wit, on, &c., well knew that it was so; and that, by reason of the premises, the said bill of exchange was not presented and shown to Tyrell for payment thereof, and payment of the said sum of money therein specified was not required. There was a similar replication to the fifth plea. To these replications, the defendant rejoined, that he did not, before the said bill of exchange became due and payable, know of the forgery of Tyrell's acceptance. Demurrer and joinder.

Campbell, in support of the demurrer. The pleas are insufficient; for they do not allege that the condition of the bond has been performed, but, on the contrary, admit that it has been broken. The only qualification in the condition is, in case the sum of 1300*l.* shall not be paid within one month after the bill of exchange shall become due. The contract therefore was, that the acceptor should have a month to pay the bill: and if then not paid, that the obligors of the bond would pay it. It is clear that it was competent for the parties to waive the necessity of any presentment, which, in fact they have done. If, in deed, it had been a special acceptance, perhaps the words, according to the tenor of the said bill, might have required a presentment: but

it does not appear that this was so. The pleas only state non-presentment; they do not say due diligence was not used, or that the drawer or endorsers were thereby discharged, which ought, at all events, to have been done. The case of *Warrington v. Furber*, 8 East, 242, is a direct authority for the plaintiff.

Chitty, contra. The authority of *Warrington v. Furber* is doubtful, after the case of *Phillips v. Astling*, 2 Taunt. 206, which, to a great extent, overruled it. Here, the obligees are bound to pay the bill, in case it be not paid by the acceptor, *according to the tenor and effect of the said bill of exchange*. Now, those words include the necessity of presentment; for they show that the ordinary course of mercantile dealings is to be followed; and part of that course is, to present the bill for payment to the acceptor, and, in case of dishonour, to give notice to the other parties to the bill. How is the acceptor to pay it, unless it be presented to him? For he cannot tell who is the holder, till it is so presented. The pleas, therefore, are sufficient.

ABBOTT, C. J. I am of opinion that the plaintiff is entitled to recover. Here, the condition, after reciting that Tufnell and the defendant had delivered and endorsed to Murray a bill of exchange, drawn by Tufnell and accepted by Tyrell, provided, that the bond shall be void in case they, or either of them, should pay the amount of the bill within one month after it became due, in case it should not be then paid by the acceptor. Now, all this, in substance, amounts to an undertaking to pay the bill, with interest, within one month after it was due, if not then paid by the acceptor. It is admitted that that month had elapsed, and that it has not been paid by the acceptor, according to the condition of the bond; therefore the defendants are answerable. It is, however, contended by the defendant's plea, that we are to engraft upon this bond those limitations which the law imposes upon the holders of bills of exchange, namely, a due presentment to the acceptor, and a notice of dishonour to the drawer and endorser. I am of opinion that we ought not so to do. I do not rely on the case of *Warrington v. Furber*, 8 East, 242; because that case has been broken in upon by the case of *Phillips v. Astling*. But there is a main distinction between those cases and the present; for, in both of them, the guaranties were given by persons not interested as parties to the original instrument. But here, the bond is given by Tufnell and the defendant, who were both parties to the bill. Now, in that character, if no bond had been given, it is clear they would have been liable, in case the formalities stated in the pleas had been complied with; and if the only object of the bond had been to give the plaintiff a security of a higher nature, and to make the party liable in case those formalities had been complied with, I think we should have found it so expressed in the condition; and not finding that, I therefore conclude that the parties meant to engage to pay the bill at all events, as sureties for the acceptor, in case he did not pay it; and if so, it is clear that the pleas are insufficient, and, therefore, there must be judgment for the plaintiff.

BAYLEY, J. I have had considerable doubts in the course of this argument; but my mind has at length come to the conclusion that the pleas are bad, and that the plaintiff is, therefore, entitled to recover. In

this case Tufnell and King were the drawer and endorser of the bill of exchange; and the condition is, that if the bill be not paid when due, for the payment of which by the acceptor they have become sureties, they would pay, or cause to be paid, the bill within one month after it became due, and was not paid by the acceptor. It is, therefore, conditioned for their own acts, in case of a given event, namely, the non-payment of the acceptor. Now, the acceptor has not paid the bill in money, nor have Tufnell and King done so. The bond, therefore, is forfeited, unless the neglect to present the bill to the acceptor, and the want of notice to the other parties, be considered by the Court as an equivalent to actual payment. Now, I think this was not the intention of the parties to this bond. If no bond had been given, laches on the part of the holder would have exonerated Tufnell and the defendant; and one object of the bond might, therefore, have been to exonerate the plaintiff from such a risk. It was very easy for Tufnell and King to ascertain by inquiry, whether Tyrell had paid the bill; and I think the fair meaning of the words in this condition was to throw upon them this obligation.

HOLROYD, J. I think that the pleas are bad. By the condition of the bond, it appears that it was given by persons who were parties to the original instrument, and who would have been answerable independently of the bond, in case the custom of merchants had been properly acted upon, namely, by a due presentment and notice of dishonour. Under these circumstances, the bond was executed; and the only event specified in the condition, upon which the money was to be paid by Tufnell and the defendant, is, in case the money is not paid by the acceptor, according to the tenor of the bill. Now, non-payment by the acceptor, even without presentment, is non-payment, according to the tenor of the bill; for a presentment is not a material ingredient to entitle a party to maintain an action against the acceptor. He may, perhaps, plead as a defence, that he was always ready to pay the bill, and that as soon as he knew who was the holder of it, he tendered the money; but a plea, that the bill was not presented to him, would be no discharge. Here, Tufnell and the defendant, in case no bond had been executed, would have been discharged by the want of notice of dishonour. The condition, however, is totally silent as to notice, as the only event there mentioned is non-payment by the acceptor. I am of opinion, that here there was no payment by the acceptor, either in fact or in law; and, therefore, that the defendant still remains liable on the bond.

BEST, J., concurred.

Judgment for the plaintiff.

WALKER v. MAITLAND.—p. 171.

The underwriters on a policy of insurance are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners.

A RULE nisi having been obtained, in Hilary term last. for setting

aside the award in this case, the Court, on cause being shown, ordered the award to be stated in a case for their opinion. The material facts stated on the face of the award were the following. The plaintiff, being owner of the ship *Britannia*, by a charter-party, bearing date the 5th day of October, 1818, chartered her to James Wildman to proceed to the West Indies, there to load a cargo of colonial produce, and to bring home the same to this country. By the usage of the trade in that behalf, the risk of bringing colonial produce in the West Indies from shore to the ships in which the same is to be conveyed home to England, is borne by the owners of ships, unless specifically agreed to the contrary. The plaintiff, to indemnify himself against such risk, with respect to loading the *Britannia* in the said voyage, on the 24th April, 1819, effected a policy of insurance in the common printed form on boats belonging to the ship *Britannia*, and on produce in said boats, or in any other craft employed in loading the ship during her stay at St. Kitts. The defendant, by his agent, subscribed the policy for 200*l*. The ship *Britannia* arrived at St. Kitts, on the said voyage, on the 6th day of January, 1819. She was manned with a competent crew, had they conducted themselves with propriety, and done their duty in loading the ship. On the 16th day of April, 1819, while the ship lay at St. Kitts, to take in her cargo, a certain sloop, called the *Vigilant*, was employed as a craft on behalf of the said plaintiff, to bring produce from a place in the island called Red Flag Bay to the ship, then lying at the distance of fifteen miles therefrom. The sloop having received a full loading of sugar, to be carried on board the ship, proceeded from Red Flag Bay about six in the morning for the ship, in charge of the chief mate and three seamen belonging to the ship, and four negroes, labourers. The sloop was sufficiently manned; and if the mate and the other persons had done their duty, the sloop, with the produce on board thereof, would have safely reached the ship. About eight in the evening the mate lay down to sleep, leaving the charge of the watch to one of the seamen, another having the helm. And soon after the mate went to sleep, the whole of the watch on duty went to sleep also. The sloop, being left to herself, ran ashore, and was beat to pieces, whereby a part of her loading was lost, and the residue damaged. The loss arose and happened from the misconduct and negligence of the persons so on board the sloop. On the 17th April, while the ship was at St. Kitts, for the purpose aforesaid, four seamen of the ship were sent ashore by the master in the long boat of the ship to bring on board a hogshead of sugar, then lying on the beach, and having put the hogshead of sugar into the boat, by their mismanagement the boat was driven on the beach and wrecked, and the hogshead of sugar was entirely washed out. If the boat's crew had done their duty, the boat would have safely reached the ship with the hogshead of sugar; and the loss thereof arose from the misconduct and negligence of the boat's crew. Upon these facts the arbitrators awarded in favour of the plaintiff.

Campbell for the plaintiff relied upon *Busk v. The Royal Exchange Assurance Company* as an authority in point, 2 B. & A. 73

Pollock, *contra*. Here the loss has happened in consequence of the negligence of the crew, who are the servants of the plaintiff, and not by perils of the sea. This is, therefore, in point of law, a loss happening from the negligence of the assured himself; and, therefore, the underwriters are not liable. In *Gregson v. Gilbert*, Marshall on Insurance, 690, it was held, that where a loss happened by a mistake of the master, it could not be considered a loss by perils of the sea. And *Buller v. Fisher*, 3 Esp. 67, is to the same effect. In this case, too, there was a breach to the implied warranty to provide a master and crew of competent skill. For here they were not sufficiently vigilant; and in consequence of that, the loss happened. *Tait v. Levi*, 14 East, 481.

ABBOTT, C. J. I am of opinion that the plaintiff is entitled to recover. The subject of this insurance was very special; it was on boats belonging to the ship *Britannia*, and on produce in the said boats, or in any other craft employed in loading the ship during her stay at St. Kitts. No doubt the owner under this policy, expected to be indemnified against the loss in question. The words of the policy are very large, and, although it may appear extraordinary, that the underwriters should undertake to indemnify the assured against the negligence of the master and crew, which is a species of misconduct on their part, yet it is clear, that they do so in the case of barratry, which is the highest species of misconduct of which the master and crew can be guilty. In this case the immediate cause of the loss was the violence of the winds and waves. No decision can be cited, where, in such a case, the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule; it will introduce an infinite number of questions, as to the quantum of care which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the mast-head to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy; in that case it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters were not liable. These, and a variety of other such questions would be introduced, in case our opinion were in favour of the underwriters. I cannot distinguish this case from that of *Busk v. The Royal Exchange Assurance Company*; there the immediate cause of the loss was fire, produced by the negligence of one of the crew; yet the underwriters were held to be liable. Here, the winds and waves caused the loss, but they would not have produced that effect, unless there had been neglect on the part of the crew. I think that the underwriters are liable for the loss that has arisen in this case.

BAYLEY, J. Here, the loss arose from the sloop with the goods on board having been beat to pieces by the force of the winds and waves; and the question in this case is, whether the underwriters are exonerated from the loss, by proving negligence on the part of the crew, although the damage was occasioned by the perils of the sea. It is the duty of the owner to have the ship properly equipped, and for that pur-

pose, it is necessary that he should provide a competent master and crew in the first instance; but having done that, he has discharged his duty, and is not responsible for their negligence, as between him and the underwriters. If that were not considered to be the law, the question must have frequently arisen, whether there had been proper care and attention by the master and mariners. It is now, however, raised almost for the first time. I am of opinion, that in this case the underwriters are liable.

HOLROYD, J. The rule of the law is, that *proxima causa non remota spectatur*, and here the proximate cause of the loss was the peril of the sea. The question is, whether the underwriters are liable for a loss proceeding directly from a peril of the sea, but remotely from the negligence of the crew. The underwriters engage to be responsible for the barratry of the master; they, therefore, engage to be responsible for the highest species of misconduct. This case cannot be put on the ground of the breach of the implied warranty to provide a master and crew of competent skill. It is sufficient, if the owners provide a master and crew generally competent: there is no implied warranty that such a crew shall not be guilty of negligence. I therefore agree with the rest of the Court, that the rule for setting aside the award must be discharged.

Rule discharged.*

* Best, J., was at absent at Chambers.

The KING v. The Inhabitants of HARDWICKE.—p. 176.

A pauper, being eighteen years of age, and residing with his father, was drawn as a militia-man, and served for five years as a balloted man. During his service, he several times, when on furlough, and finally, after his discharge from the militia, returned to his father's house: *Held*, that by his so remaining separated from his father's family after twenty-one, he was emancipated, although the original separation was not voluntary on his part.

Two justices, by their order, removed John Hinton, his wife and child, from the parish of Stanton Harcourt, in the county of Oxford, to the parish of Hardwick in the same county. The sessions confirmed the order, subject to the opinion of this Court on the following case. The pauper was born in the parish of Hardwick, and resided there as a part of the family of his father, who was a settled inhabitant of that parish. In the year 1807, when the pauper was 18 years of age, he was drawn for the Oxfordshire militia, and served therein for five years as a balloted man; the regiment, during the whole of that period, being embodied and in actual service. He joined the regiment in 1808, and in the year 1809, having obtained a furlough for three weeks, he returned to the house of his father, who was still residing at Hardwick, and lived with him for about a fortnight. In the year 1811, the pauper obtained a second furlough for a fortnight, and went again to his father's, who had removed to, and was then residing in the parish of Stanton Harcourt, where he remained for about twelve days. The

pauper was discharged from the militia in the year 1813, when he returned to his father in Stanton Harcourt, who gave him lodgings in his house till his marriage. After the pauper's return from the militia, and before his marriage, his father gained a settlement in Stanton Harcourt.

Cross, in support of the order of sessions. The pauper by remaining after twenty-one, separated from his father's family, became emancipated: *Rex v. Cowhoneyborne*, 10 East, 88, *Rex v. Roach*, 6 T. R. 247. And consequently the subsequent settlement of his father was not communicated to him. He was then stopped by the Court.

Bligh, contra. All the cases which have hitherto been determined on the subject, as to the emancipation by separation, are cases in which the separation was voluntary at first on the part of the child. That was so in *Rex v. Cowhoneyborne*, and in *Rex v. Roach* there is this distinction also, that there the separation commenced after the child attained twenty-one. Those cases, therefore, do not go so far as the present. In *Rex v. Walpole St. Peter's*, Burr. S. C. 638, and in *Rex v. Stanwix*, 5 T. R. 670, which are more similar, the distinction is, that there the paupers voluntarily enlisted as soldiers. But here, the original separation was under the control of the law, by the pauper being balloted as a militia man. This therefore is like the case of an arrest before twenty-one and continuance in prison till after, under which circumstances it could not surely be contended that the pauper would be emancipated. In *Rex v. Broadhembury*, 2 Bott. 39, a separation by force of law in a workhouse was held no emancipation, and *Rex v. Woburn*, 8 T. R. 479, shows, that the circumstance of being in the militia is not alone an emancipation. The original separation being therefore in this case compulsory, the pauper's settlement will follow that subsequently gained by his father, and the order of sessions is therefore wrong.

ABBOTT, C. J. The rule of law is, that every new settlement acquired by the parent is communicated to the children so long as they remain members of his family; and the question in this case is, whether at the time when the father gained his settlement in Stanton Harcourt, this pauper remained a member of his family. Now, during the minority of the child, he will remain almost under any circumstances unemancipated; but where the new settlement is acquired by the parent after the child has attained twenty-one, it will not be communicated unless in fact the child continues part of the family. Where, therefore, at that period he is absent, employed in gaining a livelihood for himself, or serving as in this case, in the militia, I think he no longer remains a member of the family. In the present case, I think that the sessions have come to a right conclusion, in deciding that the last legal settlement of the pauper was at Hardwick.

BAYLEY, J. I am of the same opinion. If a child be separated from his father's family, and does not return till after twenty-one, he ceases to be a member of that family, and consequently his settlement will not, after twenty-one, shift with that of his father. I think, therefore, that the sessions are right, and that this case is hardly distinguishable from *Rex v. Walpole St. Peter's*.

HOLROYD, J. I am of the same opinion. The distinction between a compulsory and a voluntary separation seems to me to be immaterial. The case must follow the same rule as *Rex v. Walpole St. Peter's*.

Order of sessions confirmed.*

* Best, J., was absent at Chambers.

The KING v. SEVILLE and Others.—p. 180

A constable apprehended an offender for a misdemeanor committed in his presence in a place of religious worship, and carried him before a magistrate, and was bound over by recognisance to prosecute him for the offence: Held, that the expenses of such a prosecution were not moneys expended by him in doing the business of his township, and that he could not charge them in his accounts under 18 G. 3, c. 19, s. 4.

THIS was an appeal by the defendants, who were overseers of the poor of the township of Quick, in the West Riding of Yorkshire, against the accounts of John Robinson, late constable of that township. At the trial it appeared, that on Sunday, in the month of December, 1819, a person of the name of William Whitehead, being in a state of intoxication, met a young woman on the road, and on his attempting to take liberties with her, she made her escape from him, and took refuge in the chapel, where divine service was just beginning; he followed her and behaved in an unbecoming and rude manner. In consequence of which he was taken into custody by the constable (who was then in the chapel) and the chapel-warden, and was the next day by them taken before a magistrate; and they were both bound by recognisance, to prosecute him at the next Wakefield Sessions for a misdemeanor, which they accordingly did; and he was found guilty, and punished by six months' imprisonment. No notice was ever given to the overseers or other inhabitants, that the prosecution was intended to be carried on at the expense of the township, nor was it mentioned or approved of, at any meeting of the inhabitants. The sessions at Wakefield, where the indictment against Whitehead was tried, were held in the month of January, 1820, and in the March following, the constable regularly, and in the way pointed out by the act 18 Geo. 3, c. 19, presented his accounts of the expenses incurred by him in the discharge of his office as constable; the whole of which were allowed, except the item of 18*l.* for the expenses incurred in the prosecution of Whitehead, the allowance of which was negatived by a large majority of the meeting of the inhabitants, held for the purpose of investigating them, upon the ground that it was not a charge which, by law, the constable could make upon the township. In consequence of this refusal, the constable duly applied to a justice of the peace, for a summons for the overseers of the poor to show cause why they should not pay this sum; and, upon the overseers appearing, the magistrate made an order, allowing the above sum of 18*l.*, against which order the overseers appealed. Upon hearing the appeal, the sessions confirmed the order.

E. Alderson and *Blackburne*, in support of the order of sessions. In this case the only question is, whether this falls within 18 G. 3, c.

19, s. 4, the preamble of which recites, that whereas constables, &c., are or may be at great charge in doing the business of their parish, township, or place, and in many cases are not sufficiently indemnified by the laws, and it then gives a power to them to charge in their accounts "all sums so by them expended on account of their parish, township, or place, in all cases not hitherto provided for by the laws heretofore made, or by this act." Now these words are very large, and are to be construed liberally in favour of a public officer. By 18 and 14 Car. 2, c. 12, s. 18, the constable's rate was created for the purpose of indemnifying him against the expenses of relieving, conveying with passes, and carrying rogues, &c., to the house of correction. By the first section of 18 G. 3, c. 19, his expenses before magistrates, previous to committal, are provided for. Now these are the cases within the words "provided for by the laws heretofore made, or by this act." The expenses, therefore, which he is to be allowed to charge in his accounts are different from those. They must, therefore, be of the nature of those charged in this case. Here, the constable was doing the business of the township; for to preserve the peace of the township was his especial duty, and the breach of the peace was committed in his presence and he was bound officially to interfere. That is the distinction between this case and *Rex v. Bird*, 2 B. & Ald. 522. There, the breach of the peace was committed in the absence of the constable, who was afterwards called in. Here, too, no individual wrong was inflicted, as there, where there was an assault. But here, what the party was taken up and prosecuted for, was an indecent brawl in the chapel, which was a general offence to all the township.

Littledale, contra, was stopped by the Court.

ABBOTT, C. J. The difficulty in this case is, to show that it was the business of the township to prosecute the individual, who in this case committed the offence: for, unless it be clearly made out to be the business of the township, it is impossible that the sums expended by the constable, in this case, can be said to be a charge in doing the business of the parish, township, or place, so as to bring it within the act of parliament. Now I am aware of no law which says that it is the business of a parish or township to enter into such prosecutions; and I am therefore of opinion, that these expenses ought not to have been allowed by the sessions.

BAYLEY, J. The constable, in this case, acted perfectly right in taking the offender before the magistrate, but he should have done no more. He, however, together with the chapel-warden, enters into a recognisance to prosecute, having no authority to do so. Now, before he did this, he should have considered, whether he was willing to enter into such a recognisance at his own expense; and if not, he should have endeavoured to have obtained some authority from the township, in which case it would have been different; but not having done so, I think he cannot charge these sums in his account as moneys expended on account of the township. Very mischievous consequences might arise, if the act of a constable could thus subject the township to heavy law expenses.

HOLROYD, J. I am of the same opinion. The constable is entitled

to charge, in his accounts, the moneys expended by him in his office, on account of the township. In this case, his duty was completely at an end, when he had carried the offender before a magistrate; and to prosecute, and to be bound over by recognisance to do so, was no part of his duty. In this respect, however, he chose to submit to the authority of the magistrate, and permitted himself to be bound over. But that act is not binding on the township. I am clearly of opinion, that these charges do not fall within the act of parliament, and that the sessions did wrong in allowing them.

Order of sessions quashed.*

* Best, J., was absent at Chambers.

The KING v. The Inhabitants of ALNWICK.—p. 184.

An order of removal was dated 1st August, 1814, and an order of suspension endorsed thereon, in consequence of the sickness of the pauper; and a copy of such order and endorsement was, in 1814, served upon the appellants, but the original order not produced at the time of serving such copy; and, subsequently, in 1815, another part of the order and endorsement executed by the same justices, but bearing date in August, 1814, was served upon the appellants. The pauper was not removed till 1819, when an appeal was duly entered: Held, that the services of the original order of removal in 1814 and 1815 were both defective, and that the appeal was made in time, notwithstanding 49 G. 3, c. 124, s. 2.

Two justices, by their order, dated the 6th August, 1814, removed Margaret Walker, a pauper, from the parish of Alnwick, in Northumberland, to the parish of parochial chapelry of Haydon, in the same county. On an appeal against this order at the Michaelmas sessions in 1820, it was discharged, subject to the opinion of this Court upon the following case: The pauper, at the time the above order, dated 6th August, 1814, was made, was extremely ill, and in such a state of health, that she could not be removed without danger; the execution of the order was, therefore, suspended by an endorsement thereon in the usual form. On or about the 6th September, 1814, a copy of the said order of removal and endorsement was delivered to and served upon one of the overseers of the poor of Haydon, by a person sent and authorized by one of the overseers of the poor of Alnwick, such person not then having the order with him; and on the 4th October, 1815, another part of the original order of removal and endorsement was delivered to and served upon one of the overseers of the poor of Haydon by the overseers of the poor of Alnwick. This last-mentioned document, so served on the 4th October, 1815, had not been executed by the removing justices on the 6th August, 1814, but was executed by them in September, 1815. It, however, bore date the 6th August, 1814. The order originally executed was not at any time shown to any of the overseers of Haydon. The suspension of the execution of the said order, on account of the sickness of the pauper, was taken off in August, 1819, and a further order was then endorsed by the justices on the order of removal for the payment, by the overseers of Haydon, to the overseers of Alnwick, of the sum of 16l. 17s. 5d., being the

charges proved upon oath to have been incurred by the suspension of the order of removal. On the 5th of September, 1820, the pauper was duly removed from Alnwick to Haydon, and an appeal against the order of removal was entered at the Michaelmas sessions, 1820. When the case was called on, and the facts above stated had been proved, it was contended, on the part of the respondents, that the appellants could not be heard, as they had omitted to appeal against the order of removal within the time allowed by law: the 49 G. 3, c. 124, s. 2, enacting that when the execution of any order of removal shall be suspended, the time of appealing against such order shall be computed according to the rules which govern other like cases from the time of serving such order, and not from the time of making such removal under and by virtue of the same. The Court, however, permitted the case to proceed, and the appeal was allowed.

Marryat, in support of the order of sessions. The question in this case is, whether the appellants were too late in making their appeal. This depends on the 49 G. 3, c. 124, s. 2, which enacts, that when execution of any order of removal shall be suspended, the time for appealing against such order of removal shall be computed according to the rules which govern other like cases from the time of serving such order, and not from the time of making such removal, under and by virtue of the same. The question, then, is, when was the order served? It clearly was not served in September, 1814, for that was an insufficient service of a copy only, without showing the original. Nor was the second service good; for that was not a duplicate, the original having been executed in 1815, by the magistrates, without any fresh examination or inquiry. It was nothing more than a copy. Then there was no valid service till the removal took place; and in that case the appeal is in time.

Littledale, contra. It must be admitted, that the first service was insufficient; but the second was valid. The date of an order is immaterial. In *Rex v. Brimpton*, 2 Nol. 184, it was in blank, and yet the order was held to be good. The mere circumstance, therefore, that this, which was executed in October, 1815, was antecedently dated, will not vitiate it. It was, therefore, an original order, which may be defined to be an order coming from the proper authority. It was not necessary that the magistrates, who were perfectly well acquainted with the case, should hear the same facts proved over again. Then, if so, the appeal should have been in 1816, and is now too late.

ABBOTT, C. J. The objection made here to the judgment of the Court of Quarter Sessions, is, that they have allowed this appeal, when in point of law, the appellants were not entitled to it, not having appealed within the time allowed by law. That question depends entirely upon the validity of the service of the order. Now, that service, in order to be valid, must be either by delivery of the order itself, or by leaving a copy of the order, and at the same time producing the original. It is admitted, that the service in 1814 was defective; but then in 1815 there was a second service. Now, if that was the service of a copy, it was bad, for the same reason as vitiated the previous service. It is, however, contended, that this was the

service of a new original order. But if we were to hold that to be so, we should, as it seems to me, give to it an effect not intended by the justices who executed it; for if they had intended it as a new order, they would have given to it a date corresponding with the time of its execution. I think that they never could have intended it as a new order, but only as an authenticated copy of their former order; and that the Court of Sessions were right in so treating it. In that view of the case, it is clear that both services are defective, and, consequently, that the appeal was in time, and the order of Sessions is therefore right.

Order of Sessions confirmed.

DAVEY and Others v. PRENDERGRASS.—p. 187.

It is not any defence at law, to an action on a bond against a surety, that by a parol agreement time has been given to the principal.

DECLARATION in debt on a surety bond, executed by the defendants, conditioned for the payment within one month after demand of such balance, not exceeding the sum of 500*l.* as upon the settlement of accounts between the plaintiffs and Samuel Prendergrass and James Peter Prendergrass, should appear to be due from the latter to the former for coals, to be delivered by them to the said S. and J. P. Prendergrass. Breach, non-payment of the said sum after demand. The defendants cravedoyer of the bond, and pleaded, first, non est factum, and second, a special plea in bar, that the plaintiffs had, by parol agreement, without the privity of the defendants, given time to the principal debtors to pay by instalments, and had taken a warrant of attorney to pay, by monthly instalments of 100*l.* each, a balance of 1099*l.* 9*s.*, found to be due from the latter to the former, upon an adjustment of accounts for coals sold and delivered, with a power of issuing execution, in case of default of payment of any one instalment when due. To this last plea there was a demurrer and joinder in demurrer.

W. H. Maule, for the plaintiffs. The question in this case is, whether giving time to the principal is a defence at law to an action on a bond against the surety. There are a great variety of authorities which no doubt may be cited, where, in bills of exchange, giving of time to the acceptor will discharge the drawer; and so also in cases of bail, giving time to the principal discharges the bail; but no case can be found in which such a defence has been pleaded to a bond. In *Donnelly v. Dunn*, 2 B. & P. 45, it was held, that bail cannot plead the bankruptcy and certificate of their principal, to an action of debt upon a recognisance of bail; and in *Bulteel v. Jarrold*,* which was a similar action of debt, the defence pleaded was, time given to the principal, to which there was a demurrer; and in the Court of Exchequer, judgment was given for the plaintiff, on the ground that this could only be taken advantage of, by an application to the equitable jurisdiction of the Court, and this judgment was successively affirmed, both in the

* Not reported.

Exchequer Chamber and in the House of Lords. In giving relief on bail-bonds, the Courts proceed on the equitable jurisdiction given them by statute 4 & 5 Anne, c. 15, s. 20; but that is not done by plea, but by summary application to the Court. Suppose an action of debt on bond, brought for the benefit of an assignee, in the name of the obligee, and a plea of a release by the obligee, the Court might, perhaps, on a proper case being laid before them, order the plea to be taken off the file, but they would not allow the facts, if replied, to be a sufficient answer to the plea. The cases of bills of exchange depend entirely on the law-merchant, and are quite distinguishable. *Burke's case*, mentioned in *English v. Darley*, 2 B. & P. 62, was a case in equity. The practice of granting injunctions in courts of equity, in these cases, is also an authority to show, that this is not a good defence at law, and no such plea as the present can be found in any of the books of entries.

Chitty, contra. The circumstance that courts of equity have it in their power to give more extensive relief in these cases than courts of law, will satisfactorily account for the fact that, most of these decisions have been upon cases in equity; for in equity the Court can direct the securities to be delivered up. The principle, however, upon which the decisions go, applies equally to a court of law. It is to be found laid down in *Nesbett v. Smith*, 2 Bro. Ch. Ca. 581, and it is this, that where the agreement with the principal alters the situation of the security, by postponing the time of payment, the surety is released from his liability. *Samuel v. Howarth*, 3 Meriv. 272, *Law v. East India Company*, 4 Ves. 824, and a variety of other authorities, may be cited also to the same point. It must be admitted, that the cases in courts of common law are, questions arising, for the most part, on bail-bonds, as *Rex v. Sheriff of Surrey*, 1 Taunt. 159, *Thomas v. Young*, 15 East, 617, *Bousfield v. Tower*, 4 Taunt. 456, *Croft v. Johnson*, 5 Taunt. 319. In *Moore v. Bowmaker*, 6 Taunt. 382, GIBBS, C. J., says, "The principle was first adopted in the Court of Chancery, that if a creditor gives time for payment to his principal debtor, without giving notice to the surety, the latter remains no longer liable to the debt." And he then adds, "The courts of law, in late days, have acted on the same principle in cases of bail." So that it should seem that learned Judge treats it as a principle which could be extended properly to courts of law. Now that principle ought to be extended to this case; for otherwise the obligor and obligee might combine together to defraud the surety. In *Orme v. Young*, Holt N. P. C. 84, this very point came before GIBBS, C. J., but was not decided. He also cited *Beadle's case*, 3 Leon. 159, and *Grenningham v. Ewer*, Cro. Eliz. 396.

ABBOTT, C. J. Looking at the nature of the security in this case, it is impossible to say, that the sureties sustained any prejudice by what has taken place, for, if the first 100*l.* was not paid, immediate executior might have issued, and it could not have been set aside. The ground, however, of my opinion in this case is; that general rule of the common law which requires that the obligation created by an instrument under seal, shall be discharged by force of an instrument of equal validity

The operation of that rule is, indeed, sometimes such, as to make it imperative upon a court of equity to interpose and grant relief, but it by no means follows, that the rule of law is to be broken down, because a Court having jurisdiction of another kind, will interpose where there is a particular case, in which the rule of law may be found to operate harshly. There is great objection to a court of law taking upon itself to act as a court of equity, because they have not the means of doing that full and ample justice which the particular case may require. We ought not, therefore, to interpose in a matter which seems peculiarly to belong to the jurisdiction of a court of equity. If a parol agreement is entered into to give time to the parties, supposing it not the case of a surety, but simply the case of a common bond conditioned for payment of money at a certain day, it will not prevent the party from proceeding at law immediately, whatever the consideration for the delay may be. And if that be so, how can the giving of time to a third person by such an agreement, prevent the obligee of the bond from proceeding at law against the surety. There may indeed be such a consideration for the agreement, as may induce a court of equity to direct that the party shall not proceed to enforce his remedy at law. But a parol agreement of this nature can never operate to control the obligation of this bond in a court of law. The decisions which have taken place in the courts of equity in cases of this nature, have always, as I understand them, proceeded on the notion, that at law, the thing prayed for could not be done. Bills of exchange stand upon a very different footing, there the law merchant operates, and the courts of law decide upon them with reference to that law. Guaranties for the payment of debts are not in general instruments under seal, and there is no strict technical rule, which, as to them, prevents a court of law from looking to the real justice of the case. The cases of bail and replevin bonds are provided for, by acts of parliament giving to the court an authority over them. But in both these cases, the jurisdiction is exercised always upon special application founded upon affidavits and not upon plea. A recognizance of bail stands upon a different ground from bail bonds as to the jurisdiction of the Court. There the jurisdiction is not founded upon statute, but upon a general authority in the Court, to see that an improper use is not made of its own records. Therefore, in that case, as well as in the case of bail to the action, and of bail to the sheriff, if the Court sees that an improper use is attempted to be made of the security which the party has given, it immediately interferes. And that also is always done upon special application to the Court, upon affidavits setting forth all the circumstances of the case. In the case of *Bulteel v. Jarrold* in the House of Lords, which has been referred to, in which an attempt was made to put the matter on the record by way of plea, it was held, that it was no bar to the action. So in this case, which appears to be the first of the kind brought before this Court, although similar cases must have occurred very frequently, I am of opinion that we, deciding on legal principles, are bound to say, that this plea is no answer to the plaintiff's action. There must, therefore, be judgment for the plaintiff.

HOLROYD, J.* I think that in this case, the plea is not good in law. The circumstances there stated neither amount to a performance of the condition, nor to a legal excuse for non-performance of it. The bond which has been executed by these two sureties is conditioned for the payment of any balance not exceeding 500*l.* that may be due for goods sold upon credit to two other persons, within one calendar month after demand made. The effect of the plea is, that an unreasonable time was given to the original debtors, and that a warrant of attorney was taken for that purpose, having been given in pursuance of a *parol* agreement. Such an agreement, and the taking of the warrant of attorney, in my opinion, does not constitute, in law, a payment of the original debt, nor an annihilation of it. The mere giving time by *parol*, without consideration, is not even binding on the party himself. In this case there seems to have been some consideration for the time given, namely, the giving the warrant of attorney, which would give the plaintiff a debt of a higher nature, by allowing a judgment to be entered up in case of non-payment of the first instalment. That certainly was a good consideration for the forbearance. But the merely giving an engagement that a man shall not sue for a limited time, is not a release in law of the original debt. An agreement that a man shall not sue at all, with a good consideration for it, amounts to a release, and would be an annihilation of the original debt; but an agreement to give a limited time to pay the debt, as in this case, does not destroy the original debt, nor the liability to the payment of it. The original debt, then, remains; and by the condition of this bond, the obligors are bound to pay within a month after demand made of them. There is no performance of the condition of the bond, nor any release of the original debt. None of the circumstances mentioned in the plea amount to a performance of the condition; if they could, the condition would then be considered as performed, and the defence would be good in law. But that is not so; the whole defence set up arises upon a *parol* agreement. Now, suppose to that *parol* agreement the obligors had been parties, and the obligees had stipulated that they would not sue on the bond: still, unless that agreement was of as binding effect as the bond itself, it would avail nothing; for a mere *parol* agreement cannot be pleaded in bar, unless by operation of law it amounts to the performance of that which is the subject-matter stipulated for by the condition. Neither of these cases exist, from the circumstances which have been pleaded in this case; and, therefore, I think this plea does not amount to a defence in law. All the cases, or nearly so, upon this subject, except cases on bail bonds, in which this Court entertains a sort of equitable jurisdiction, have been cases decided in courts of equity; and I think that the very principle upon which courts of equity give relief is, that the circumstances under which they give relief do not afford a good defence in point of law. I think this plea is bad.

BEST, J. I am also of opinion that this plea is bad. The case which has been referred to, as having been decided in the Court of Exche-

* Bayley J., was absent at Chambers.

quer, and finally in the House of Lords, appears to me, in principle, to be decisive of the present case. That being the case of a recognizance of bail, the Court had a right to interfere, with respect to the use made of that recognizance, being one of their own records, in a manner in which they would not interfere in an action upon a bond; but that circumstance made no difference in the decision. It was there decided, that the giving time to the principal, although the party might be relieved by the equitable jurisdiction of the court in which the recognizance of bail was taken, could not be pleaded in answer to the action. It is also perfectly clear, that no delay on the part of the creditor, in calling upon the principal debtor to pay, will, in a court of law, discharge the security. In the case of the *Trent Navigation Company v. Harley*, 10 East, 34, it is there said by Lord ELLENBOROUGH, that no such delay would be a discharge of the security, in point of law, from an obligation of this description. The indulgence, by giving further time, is, in this case, by parol; if this would be an answer to an action on a bond in a court of law, there is no doubt we should have found numerous precedents on the records of this Court, in which it had been so decided, because cases of this kind must have frequently occurred; but every instance in which relief is given by a court of equity, is a decision against this as a defence at law. I am of opinion, that if these defendants are entitled to any redress, they must go to a court of equity, where the court may consider every circumstance, and judge for itself, whether any relief can be afforded. We, however, have only power to decide upon the legal validity of the instrument. I think, therefore, there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

W. J. RICHARDSON the Younger and Others, Assignees of the Estate and Effects of HENRY WYLIE and W. J. RICHARDSON the Elder, v. CAMPBELL and Another.—p. 196.

A transfer of a ship, while at sea, to a vendee resident in the port in which the ship is registered, is not valid, unless copies of the bills of sale are delivered to the custom-house officers in that port, within a reasonable time after the sale.

TROVER for a ship. Plea, the general issue. The cause was tried at the London Sittings before Michaelmas term, 1820, when the jury found a verdict for the plaintiff for 1989*l.* damages, subject to the opinion of the Court on the following case:

A commission of bankrupt was issued, on the 23d December, 1817, against H. Wylie and W. J. Richardson, of London, merchants and partners, founded on a sufficient trading and petitioning creditor's debt, and an act of bankruptcy was committed by both the bankrupts on the 22d December, 1817, and the plaintiffs were appointed assignees under the commission. On the 30th December, 1816, the said H. Wylie and W. J. Richardson the elder, together with the other plaintiff, W. J. Richardson the younger, were the owners of the ship *Sir Alexander*

Ball, belonging to the port of London. W. J. Richardson the elder, on the 7th September, 1815, (he being then a part-owner of the ship *Sir Alexander Ball*.) duly executed a power of attorney to his partner H. Wylie, to sell his share in the ship, &c., and execute a bill of sale in his behalf. A bill of sale of the ship to the defendants was duly executed by the respective parties on the 31st December, 1816; and another bill of sale was executed on the 21st July, 1817, by the said W. J. Richardson the younger, of part of the said ship. At the time of the execution of the bills of sale, the several parties thereto were resident in the city of London, except W. J. Richardson the elder, who was at sea. On the 31st December, 1816, when the first of the above-mentioned bills of sale was executed, the said H. Wylie handed over to the defendants the original bill of sale, which had been made to the said W. J. Richardson the younger, of one 64th part of the said ship, dated 28th March, 1816. At the respective times of the execution of the bills of sale, there was a much larger sum of money due from Wylie and Richardson to the defendants than the amount of the consideration expressed in the bills of sale. On the 31st December, 1816, the ship was at sea on a voyage from London to Hayti, and from thence to Rotterdam, under the directions of W. J. Richardson the elder, who was in her, and who was ignorant of the said transfers till the ship was taken possession of by the agents of the defendants. The ship, from the time she left England on her voyage, in April, 1816, has not since returned to the port of London, or any other port in Great Britain. No copy of either of the bills of sale was at any time delivered to the person or persons authorized to make registry and grant certificates of registry in the port of London, nor was any entry thereof endorsed, on the oath or affidavit, upon which the original certificate of registry of such ship or vessel was obtained, nor was any memorandum thereof made in the book of registers, nor was any notice thereof given to the commissioners of the customs in the port of London. In January, 1817, the ship arrived at Leghorn, under the command of the said W. J. Richardson the elder, and was shortly afterwards taken possession of by Messrs. Fletcher, M. Bean, and Co., as the agents of the defendants, by virtue of the transfers which had been made to the defendants, as before mentioned; and on the 11th December, 1817, the ship was sold and assigned by Fletcher, M. Bean, and Co., under a power of attorney from the defendants, and the certificate of registry of the ship, which had been deposited by the said W. J. Richardson the elder in the hands of his Britannic Majesty's consul, thereupon remained with the consul, for the purpose of being cancelled. This case was argued on a former day in these sittings, by *Campbell* for the plaintiffs, and *Puller* for the defendants; and the question turned entirely on the construction of the 34 G. 3, c. 68, s. 16.* It is unnecessary to

* The words of that section are: "Provided always, that if any ship or vessel shall be at sea, or absent from the port to which she belongs, at the time when such alteration in the property thereof shall be made as aforesaid, so that an endorsement on the certificate cannot be immediately made, the sale, or contract, or agreement for the sale thereof, shall, notwithstanding, be made by a bill of sale or other instrument, in writing, as before directed; and a copy of such bill of sale or other instrument, in writing, shall

report the arguments, inasmuch as they are adverted to in the judgment delivered by the Court, and did not materially differ from those which were urged upon the same point, in the case of *Hubbard v. Johnstone*, 3 Taunt. 177. The authorities cited on the part of the plaintiffs were, *Moss v. Charnock*, 2 East, 399, *Palmer v. Mozon*, 2 M. & S. 48, *Dixon v. Ewart*, 8 Merivale, 322. On the part of the defendants, *Hubbard v. Johnstone*, and *Hodgson v. Browne*, 2 Barn. & Ald. 427, were cited.

Cur. adv. vult.

ABBOTT, C. J., now delivered the judgment of the Court. We are of opinion that this action may be maintained. The question is, whether at the time when the defendants took possession of and sold the ship, the title thereto was vested in them under the bills of sale executed by the plaintiff, W. J. Richardson the younger, and the bankrupts, or whether those bills of sale became invalid, and thereby the property at the time I have mentioned was vested in the plaintiffs. There is no objection to the sufficiency of the bills of sale in themselves: the objection to the defendants' title is, that by their omission to deliver copies of the bills of sale to the custom-house in London, within a reasonable time, the bills of sale became null and void. It is clear, that a reasonable time for delivering those copies had long expired, and no copies ever were delivered, so that the question is, in effect, reduced to the necessity of delivering copies. We who heard the argument, are all of opinion,* that it was necessary to deliver them, and that by the omission to do so, the bills of sale became invalid by the effect of the 84 G. 3, c. 68, s. 16. In support of the defendant's title, and against the necessity of delivering copies, the decision of the Court of Exchequer Chamber in the case of *Hubbard v. Johnstone* was cited and relied upon. But there is a material difference between the two cases. In that case, the ship belonged to, and was registered in, the port of Newcastle. While she was at sea on a voyage, a bill of sale was executed, conveying the property to Hubbard, who resided in London. The ship never went to the port of Newcastle, but came to London, and was there registered anew by Hubbard, the vendee, at the custom-house in London. In the present case, the ship belonged to London; the bills of sale were executed in London, and the defendants were resident in London, so that the change of owners would not occasion a change of port. In the former case, according to Mr. Taunton's report, the opinion of one at least of the learned judges who were for reversing the judgment of this Court, was grounded entirely upon the change of the ship's port; he being of opinion, that the 16th section

be delivered, and an entry thereof shall be endorsed on the oath or affidavit, and a memorandum thereof shall be made in the Book of Registers, and notice of the same shall be given to the commissioners of the customs, in the manner hereinbefore directed; and within ten days after such ship or vessel shall return to the port to which she belongs, an endorsement shall be made and signed by the owner or owners, or some person legally authorized for that purpose by him, her, or them, and a copy thereof shall be delivered, in manner hereinbefore mentioned; otherwise such bill of sale, or contract, or agreement for sale thereof, shall be utterly null and void, to all intents and purposes whatsoever; and entry thereof shall be endorsed, and a memorandum thereof made, in the manner hereinbefore directed."

* Abbott, C. J., Bayley, J., and Holroyd, J.

of the statute is confined to the case of a sale when the ship is at sea, and does not change her port. This change of port appears also to have weighed materially with the other judges, though it appears that some of them, and particularly Mr. Baron Wood, thought the annulling clause at the end of the 16th section, must be confined in construction to the omission of an endorsement, and delivery of a copy thereof, within ten days after the ship's return to her port, and could not be extended to any of the precedent parts of the section, because it could not be extended to all the precedent parts, as it undoubtedly cannot. In the present case, as I have before observed, the change of ownership would not lead to a change of port, and the present case is not one of those in which the legislature has required a register *de novo*. And supposing the words "alteration of property in the port to which the ship belongs," as they are found in the 15th section, by which an endorsement on the certificate and delivery of a copy thereof are required, to be confined to a change of owners only, without a consequential change of port, we think it clear, that if the ship be absent from her port at the time of such change, "so that an endorsement on the certificate cannot be immediately made," which are the words of the 16th section, the delivery of a copy of the bill of sale is, by that section, substituted in the place of the endorsement on the certificate, until ten days after the ship's return, and the omission to deliver a copy of the bill of sale is to be followed by the same consequence in the case of an absent ship, as the omission to make the endorsement and deliver a copy thereof, if the ship be at home. In the 15th section, the clause of nullity follows immediately after the requisition of the endorsement and delivery of the copy thereof, and is itself followed by the direction to the officers, to which therefore it does not apply in form, as in reason it ought not to apply. The 16th section begins with the word "provided always," and evidently contains a substitution of a new matter in the place of the matter previously required by the 15th, where the matter so previously required is impracticable; and therefore, even if the 16th section had contained no express clause of nullity, still there would be strong reason to say, that the clause of nullity in the 15th section should be drawn down and applied to so much of the 16th, as contained the substituted matter. But taking the two clauses together, and seeing that, by the very form and frame of the 15th section, the clause of nullity applies only to the acts of the parties, we find no difficulty in saying, that it may be so confined in the 16th section, although it follows all that is therein mentioned, as well the acts of the parties as those of the officers; and that it may, and ought to be, extended to all the acts of the parties, as well that act which is mentioned before the direction to the officers occurs, as that which is mentioned after such direction. If this be not the true construction of the 16th section, in a case to which that section will apply, if it be not necessary to deliver a copy of a bill of sale, in the case of a sale made in the ship's absence, to a person residing at her port, then it may follow, that the ship may, for as many years as she shall continue serviceable, enjoy the privileges of a British ship, and trade as such,

not only from one plantation or part of the king's foreign dominions to another, but also from, and to any port of Great Britain, except her own port, and during the whole of this period, the names of her real owners will be unknown to, and undiscoverable by, the officers of the government. And this, as far as it extends, will be in utter contravention of the policy of these statutes, and defeat their object, which object unquestionably was to furnish, by the medium of registration, an accurate knowledge, at every instant of time as far as practicable, of the name of every person having property in a British ship, in order to secure the benefits of that national character of a ship to his majesty's subjects, and to exclude foreigners from participating in them.

Judgment for plaintiffs.*

* It appeared in this case that the ship, on her arrival at Leghorn, was attached, to answer a claim made on behalf of certain merchants in London, for compensation on account of her not having carried a quantity of tobacco (which had been shipped at Hayti) to Rotterdam, agreeably to bills of lading; and the defendants' agents were obliged to give security to answer this claim, and, afterwards, under the sentence of the Court, to pay the amount thereof. The defendants' agents had, besides, paid, in pursuance of an order of a competent court at Leghorn, a certain sum for salvage of the ship, she having been driven on shore in a gale of wind before she was taken possession of by them. They had also paid, in pursuance of an order of the court, a certain sum for the wages of the captain and the crew. And they had also paid other sums for butchers' and ship-chandlers' accounts, and sundry ship disbursements, before she was taken possession of by them. And it appeared, further that the defendants knew of the fact of the voyage to Rotterdam having been abandoned; for they had cancelled a policy originally effected from Hayti to Rotterdam, and effected another from Hayti to Malta. The Court were clearly of opinion, that the money paid under the attachment, the salvage, and the mariners' wages, were a lien on the ship, and that the defendants, therefore, were entitled to deduct those sums from the proceeds of the sale of the ship, but not the sums paid for the captain's wages, nor the disbursements; and the verdict was reduced accordingly.

MURRAY, Administrator of W. HOPE, deceased, of the Goods left unadministered by JAMES MURRAY, deceased, v. THE EAST INDIA Company.—p. 204.

Assumpsit will lie upon a bill of exchange, against a trading corporation, whose power of drawing and accepting bills is recognized by statute.

A power of attorney authorizing an agent to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all moneys, debts, dues whatsoever, and to give sufficient discharges, does not authorize him to endorse bills for his principal.

In an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due, there being no cause of action until there is a party capable of suing.

An agent, having money in his hands belonging to his principal, purchases with it a bill of exchange, which he endorses specially to his principal; the latter, at the time of the endorsement, was dead, but that fact was not known to the agent: *Held*, that the property in the bill passed to the administrator of the principal, and that he might, therefore, sue upon the bill in that character: *Held*, also, that the administrator was only entitled to recover interest upon bills accepted after the death of the testator, from the time of demand of payment made by the administrator, and not from the time the bills became due.

Where the declaration stated the drawing of certain bills of exchange, and their acceptance after the death of the intestate, the granting of the letters of administration to the plain-

tiff, the defendant's liability, &c.; and the defendants pleaded that the cause of action did not accrue within six years; to which the plaintiff replied generally, that it did accrue within six years: It was held, that the replication was good.

ACTION against the defendants, as acceptors of four bills of exchange. The first was for 8940*l.*, and dated Fort St. George, the 20th January, 1809, drawn by Keble, the secretary to Government; payable to William Hope, Esq., three months after sight. This bill was directed to the Honourable Court of Directors for affairs of the Honourable United Company of Merchants trading to the East Indies, in London; and it appeared to have been accepted by the secretary, by order of the Court, from the 20th July, 1809; and it was endorsed by James Card, to Davies and Card, or their order, and by the latter again to Barclay, Tritton, and Co. The second and third bills of exchange, which were for 13,200*l.* and 1141*l.*, respectively, were of the same date, payable at three months sight, and precisely in the same form as the first. The fourth bill, which was for 705*l.*, was dated the 26th August, 1809, and was accepted from the 12th April, 1810, and payable at twelve months sight to Messrs. Binny and Dennison, and endorsed by them to William Hope, Esq., or order.

The declaration contained counts on the first three bills, stating, respectively, the drawing of the bills, the acceptance of them, after the death of William Hope, the grant of administration to James Murray, on the 13th February, 1812; the liability of the defendants to pay to James Murray, as administrator, according to the form and effect of the bills; and their acceptance, and a promise to James Murray, as administrator, accordingly. Another set of counts on these three bills stated, the drawing of the bills; the acceptance of them; that neither the said W. Hope, nor James Murray, nor the plaintiff, nor any persons as the personal representatives of W. Hope, made any order for payment of the bills; nor had the money been paid to them, or either of them; the grant of administration to James Murray, on the 13th February, 1812; the grant of administration of the 31st October, 1814, to the plaintiff; the liability of the defendants to pay the plaintiff, as administrator, on request, and a promise accordingly. The declaration also contained a count on the fourth bill, stating the drawing of the bill; the endorsement by Binney and Dennison; the payee's money to be paid to the said W. Hope; the acceptance; the grant of administration to James Murray; the liability of the defendants to pay to James Murray, as administrator, according to the tenor and effect of the bill; and acceptance, and a promise to James Murray, as administrator, accordingly. Another count on the same bill, after stating the drawing of the bill, alleged that Binny and Dennison, after the death of the said W. Hope, having been indebted to him at the time of his death in the sum mentioned in the bill, and the debt remaining due and unpaid, in satisfaction of the said debt endorsed the bill at Madras, ordering the money to be paid to the said W. Hope, and remitted the bill to England in a letter, addressed to Hope; that after his death, the defendants accepted the bill; that after the bill was due, administration was granted to James Murray, whereby the said defendants be-

came liable to pay to him, as administrator, on request, and promised payment accordingly. The declaration contained the common counts; and a profert of the letters of administration was subjoined. Plea, non assumpsit; secondly, as to the counts on the first three bills, that the causes of action did not accrue within six years before the commencement of the action. Replication, that the causes of action did accrue within six years, &c. The cause was tried before Abbott, C. J., at the sittings after Trinity term, 1819, when the jury found a verdict for the plaintiff, for the principal sum due upon the bills, with interest from the time they respectively became due till the time of signing final judgment. Upon a motion for a new trial, the Court directed the facts to be stated in a special case.

The four bills of exchange declared upon were drawn by order of the governor in council, at Madras, in the usual form in which bills of exchange are drawn upon the East India Company at home, from the different presidencies in the East Indies. They were severally accepted in the usual manner by the secretary to the Company, by order of the Court of Directors. Bills so drawn on the Company, are always accepted in this form by the secretary for the time being, by order of the Court of Directors, and being so accepted, are paid by the Company. The defendants have paid bills, so drawn and accepted, to the amount of many millions. Mr. Hope, the payee of the three first bills, being about to embark for London, remitted them in a letter by one of the ships in the fleet hereinafter mentioned. This letter was inclosed in a sealed envelope, addressed thus: "Wm. Hope, Esq., to the care of John Card, Esq., London." It was not addressed to any person by name, and was as follows: "My old friend, you will find inclosed bills as follows, which, when cashed, I would recommend your being particularly careful of." The letter then specified the several bills inclosed, including the three first bills mentioned in the declaration in this cause. On the 30th January, 1809, Hope embarked, with his wife and family, on board the ship *Jane Dutchess of Gordon*, and sailed with a large fleet of East Indiamen for Europe. On the 14th of March the fleet encountered a hurricane, and the *Jane Dutchess of Gordon* perished in the storm, and Hope was drowned. On the 7th of October, 1800, Hope executed a power of attorney to Card, by which he appointed J. Card to be his true, certain, and lawful attorney for and in his name, and to and for his proper use and behalf, to demand, levy, sue for, recover, and receive, by all lawful ways and means whatsoever, and from all and every person and persons whomsoever, whom it did or might concern, all such sums of money, debts, dues, goods, effects, and things whatsoever, which then and were, should be and prove due, owing, payable, or belonging to him the said W. Hope, up on or by virtue of any bill, bond, book, or upon account of trading or dealing, or upon any account howsoever; and if need were, to call to account all persons concerned in the premises; and upon receipt and recovery of all such sums of money, debts, dues, goods, effects, or other things, or any part thereof, sufficient acquittances and discharges for him and in his name, from time to time, to make and give: giving and

granting by them, unto his attorney full power and authority in the premises to sue, pursue, arrest, attach, seize, sequester, implead, imprison, condemn, and prosecute, and them and thereof again to acquit, discharge, and out of prison to release, also for him to appear, and his person to represent in all or any court or courts, or other places, as demandant or defendant in any suit or action, or by reason of the premises; likewise one or more attorneys under him, to set and substitute and appoint, and again at pleasure to revoke; and generally to do, act, and perform all other matters and things in and towards the premises requisite and necessary, as fully as himself could do, if he were personally present. John Card, who was at Madras at the time when the power of attorney was executed, and who had been at one period in partnership with Hope, in India, soon after sailed to England, and since his arrival has continued to reside here, and has been in partnership with William Davies, under the firm of Davies and Card. The first three bills of exchange were not endorsed by Hope, but having come into the possession of Card after Hope's death, were endorsed by him in the following form. "Pay Messrs. Davies and Card, or their order, per procuration of William Hope.—J. Card." These bills, when due, were paid by the defendants to Barclay, Tritton and Co., then the holders thereof. Before Hope left Madras, he appointed Messrs. Binney and Dennison, of Madras, his agents, to manage his private affairs, collect his property there, and transmit the same to London; and he left in their hands a government promissory note for 1660 pagodas, which was paid by them at the treasury, and they received for it the fourth bill of exchange mentioned in the declaration. Binney and Dennison endorsed the bill specially to Hope, and remitted it in a letter addressed to him at Messrs. Davies and Card's. The letter came to Davies and Card, in April, 1810, was opened, and the bill taken out, and the name "W. Hope" was endorsed on the bill. This bill was paid, when due, to Glyn, Mills and Co., then the holders thereof. On the 13th February, 1812, letters of administration of the effects of Hope, with his will annexed, were granted to James Murray. There were no executors named in the will of Hope. James Murray died on the 10th October, 1814, and on the 31st of October, 1814, letters of administration of the effects of Hope, unadministered by James Murray, with his will annexed, were granted to the plaintiff. The action was commenced on the 27th of August, 1816.

This case, which involved several points, was argued on a former day in these sittings, by *Campbell*, for the plaintiff, and *Tindal*, for the defendant. For the plaintiff it was contended, that assumpsit was maintainable in this case against a corporation; for a corporation established for trading purposes, might bind themselves, by accepting bills of exchange. *Broughton v. The Manchester Water-Works*, 3 Barn. & Ald. p. 1. And this power of the defendants to draw and accept bills was recognised and regulated by the 9 and 10 W. 3, c. 44, and the 53 Geo. 3, c. 155, s. 57 and 58. In *Edie v. The East India Company*, 2 Burr. 1216, it was not doubted that an action would lie

against the Company upon a bill of exchange. As debt will not lie against the acceptor of a bill of exchange, assumpsit must in this case, otherwise there will be no remedy. For the defendants, upon this point, it was argued, that although they had undoubtedly the power of binding themselves as acceptors of bills of exchange, it by no means followed, that the remedy which the law gave for the breach of a parol promise, would apply against a corporation. The objection to this form of action was, that a parol promise can be made only by the members of the corporation, and that the individuals, and not the body corporate, would be liable. The proper remedy in this case was by bill in equity. Upon this point, the Court were clearly of opinion, that wherever an act of parliament authorizes a corporation to draw and accept bills, it must be taken to give the holder of those bills the same remedy against the body corporate, as the law gives in other cases against any parties to a bill.

The next point was, whether Card was authorized to endorse these bills; and it was contended, for the plaintiffs, that he had no authority to endorse the bills, even during the life of Hope. The power of attorney only gave an authority to him to receive debts due, and not to negotiate the bills. *Hogg v. Snaith*, 1 Taunt. 347, and *Hay v. Goldsmidt*, there mentioned, were authorities to show, that a power of attorney to receive all salary and money belonging to the principal, and to give releases, and even to transact all business for him, did not authorize the attorney to negotiate or endorse bills. The letter contained no such power, for Card had not even an authority to break the envelope. For the defendants, it was argued, that Card had such authority; for the endorsing of the bills was one mode of receiving payment, and in the cases cited, the action was brought against the persons who had discounted the bills, and not against the acceptor; and it was the same thing, whether Card received the amount of the bills at maturity, or authorized another to receive it. Besides, it appeared clearly, from the terms of the letter, that Card was to open it, if Hope died on the voyage. The words in the letter "when cashed," implied, that he was to have authority to endorse the bills; for one mode of cashing is by endorsement. Upon this point, the Court were clearly of opinion, that Card had no authority to endorse the bills, even during the lifetime of Hope; and that it therefore became unnecessary to consider the question, whether Hope's death operated as a revocation of any authority given to him by the power of attorney.

Upon the other points raised in this case, the Court gave no opinion at the time. It was contended on the part of the defendants, that the plaintiff could not be entitled to recover interest upon the bills beyond the date of the first letters of administration, for it would be very hard upon an acceptor, that he should be charged with interest when he was ready to pay the money, and there was no person authorized to receive it. There could be no lawful detainer of the money until the administration was granted, *Walker v. Barnes*, 5 Taunt. 240, and *Anonymus*, 6 Mod. 138, were cited. As to the two other points raised in

the case with respect to the statute of limitations and the form of the replication, the following authorities were cited, *Stanford's* case in *Saffyn v. Adams*, Cro. Jac. 61, *Joliffe v. Pitt*, 2 Vernon, 694, *Carey and Wife v. Stephenson*, Salk. 421, Carthew, 835, Skinner, 555, and 4 Mod. 372, S. C., and *Matthews v. Phillips*, Salk. 424. The arguments and the authorities cited upon these points, were, however, so fully commented on by the Court in giving their judgment, that it is unnecessary to state them at greater length here.

Cur. adv. vult.

ABBOTT, C. J., now delivered the judgment of the Court. At the late argument of this case, some of the points were disposed of by the Court at the time. It is now proposed to give our judgment upon such as were then reserved for our further consideration. And first, as to the statute of limitations. The action is brought by an administrator, with a will annexed, of goods left unadministered by a former administrator, but it may be considered as brought by the first administrator. The action is upon several bills of exchange accepted by the defendants, who have pleaded as to three of them, that the cause of action did not accrue within six years before the exhibiting of the plaintiff's bill. The plaintiff has replied generally, that the cause of action did accrue within six years, &c. These bills were made payable to Mr. Hope: they were accepted after his death, being presented through an unauthorized channel, and before any administration was granted. The acceptance of the bills, and also the day of payment, was more than six years before the exhibiting of the bill, but the granting of the first administration was less than six years before, &c. Upon this state of facts, the general question of law, abstracted from the particular form of the replication, is this; did the time of limitation prescribed by the statute 21 Jas. 1, c. 16, s. 3, begin to run from the date of the defendants' acceptance, or the day of payment, at which time there was no person in existence who could acquire a right of action by the acceptance, and non-payment, or from the date of the first administration, whereby a person was brought into existence, who might acquire a right of action by the non-payment? The plaintiff insisted upon the latter, the defendants upon the former date.

On behalf of the plaintiff, *Stanford's* case, cited in Cro. Jac. 16; and *Cary v. Stephenson*, reported in Salkeld, 421, and several other books, were quoted. The first of these cases arose upon the statute of fines, 4 Hen. 7, c. 24; a term of years was granted in remainder, expectant on another existing term; before the expiration of the first term, the grantee died; at the expiration of the first term, the lessor entered, and levied a fine before administration granted; the five years passed, administration was granted, and resolved, that the administrator should have five years, for none had title of entry before. The last of these cases is precisely the same as the present case. It was an action of assumpsit for money had and received, brought against one who had received money belonging to the estate of the intestate, after his death, and before administration granted; the receipt being more than six years before the action, but the grant of the administration

within six years. The opinion of the Court was, that the time of limitation did not begin to run until the grant of the administration; but the suit appears to have gone off, or the plaintiff to have failed upon a supposed defect in his replication. Since the argument, we have been apprised of another case lately decided in the Court of Common Pleas, but not reported. The name of it is *Fairclaim v. Little*. It arose upon the gift of a term of years to A. for life, remainder to B. for life, remainder to C. C. died in 1736, A. in 1756, B. in 1779. Administration of the effects of C. was first granted in 1816, and the administrator brought an ejectment, and was nonsuited at the trial, but the Court granted a new trial. No authority was quoted on this part of the case, on behalf of the defendant. But it was said, that *Stanford's* case was not an authority in point, because it arose on a statute differently expressed; the words of the statute Hen. 7, being "so that they take their action or pursue their right within five years next after such action, right, &c., to them accrued, descended, &c." In answer to the other case quoted for the plaintiff, it was said, that as the cause was not decided in favour of the plaintiff, the opinion must be considered as extra-judicial, and that the whole of that case taken together, was in favour of the defendant upon the other point, to which I shall advert hereafter. We are, however, of opinion, that the time of limitation in the present case did not begin to run until the grant of the administration. The words of the statute 21 Fac. 1, c. 16, s. 3, are, that actions upon the case, &c., shall be brought within six years, next after the cause of such actions, and not after. Now, independently of authority, we think that it cannot be said, that a cause of action exists, unless there be also a person in existence capable of suing. And we think great deference is due to the opinion delivered by the Judges on this point in *Cary v. Stephenson*, and also that *Stanford's* case, and the late case in the Common Pleas, are authorities in favour of the plaintiff. The several statutes of limitation being all in *pari materia*, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same. I have already quoted the words of the statute of fines. The words of the first section of 21 Fac. 1, c. 16, as it regards entry into lands, are, "that no person or persons shall make entry into any lands, &c., but within 20 years next after his or their right or title, which shall hereafter first descend or accrue to the same. Other slight variations of expression may be found in other parts of this and the statute 32 Hen. 8, c. 2. But it is not necessary to particularize them; the object manifestly being to limit the time of entry or suit to a person in *esse*, capable of entering or suing, and nothing more.

On this part of the case, another and formal objection was taken by the defendants. It was said, that the plaintiff ought to have made a special replication setting forth the time of the grant of administration and other particulars. Now, it already appears upon the record, that the acceptance was after the death of the intestate. What special matter then could the plaintiff reply? It could only be, that the first administration was granted at such a certain time, which probably does

not appear with sufficient precision upon the declaration. But this would only have been an argumentative replication, for its effect would be this: you, the defendants have alleged that the cause of action did not accrue within six years: I, the plaintiff, say, that it did accrue within six years, because my bill had been filed within six years of the grant of administration. Now, if this be the due effect of the grant of the administration, then the plaintiff did right in omitting the argument, and replying generally, that the cause of action did accrue within six years, and offering the administration and the time of granting it, in evidence, to prove his allegation. And this is very different from all the cases in which a special replication is usually made, such as infancy, coverture, absence beyond sea, or the suing out a latitat, or other writ, or process, because, in all those cases, the plaintiff admits, that the action did not really accrue within six years of the apparent commencement, and either brings himself within some exception in the statute, or shows that his action was commenced before the date, which the plea assigns as the commencement of it.

There was a fourth bill of exchange, to which the statute was not pleaded, and which gave occasion to another point. Mr. Hope, at his departure from India, had left some property under the management of an agent. For the value of this, and for the purpose of transmitting the value to England, the agent obtained this bill of exchange, and being ignorant of the death of Hope, endorsed it specially to him. It was urged that no property in this bill could pass to the administrator, and consequently that he could not sue upon it. But we are of opinion, that as the money for which the bill was remitted, belonged to Hope's estate, it was competent to the administrator to elect to take the bill as the mode of payment, and that thereby, the property did vest in him, and he acquired a right to sue upon it.

The only remaining matter is the interest upon the bills, which has been taken from the time that they respectively fell due. We are of opinion, that the plaintiff is entitled to recover interest, but that the calculation must begin from the time of the demand of payment by the first administrator, and not sooner.

Judgment for the plaintiff.

REGULA GENERALIS.—p. 217.

Michaelmas Term, 2 Geo. 4. Nov. 6.

It is ordered, that the rule of Court made in Michaelmas term, in the 11th year of King George the First, which directs that no summons shall be attended, nor any matters transacted before any Judge at chambers or elsewhere, during the sitting of this Court at Westminster, be discharged.

By the Court.

During the term one of the Judges attended daily at chambers from half past two until four.

In the Matter of TAYLOR and Others.—p. 217.

A submission to arbitration under 9 and 10 W. 3, c. 15, s. 1, may be made a rule of Court in vacation.

F. Pollock moved for a rule nisi in this case, to discharge the rule for making the submission to arbitration a rule of Court. The facts were shortly as follows. It was a submission to arbitration, by bond under the statute of 9 and 10 W. 3, c. 15, s. 1. The award was dated on the 30th June last, but the submission was not made a rule of Court till the 28th September, during the vacation after last Trinity term. A bill in equity had been since filed by the party against whom the award was made. He now contended, that in this case, by the words of the statute, the submission can only be made a rule of Court, by producing an affidavit of the execution of the agreement, and reading and filing it in Court. This shows that it must be done in Court, and cannot be done in vacation, as was the case here.

Scarlett showed cause in the first instance. The object of the statute was to facilitate arbitrations, and to prevent bills in equity. It must be construed with reference to the ordinary practice of the Court in other cases. Now it is the practice to do business in vacation as of the preceding term. Thus a writ may be issued in vacation tested of the preceding term. As to the affidavit, that can make no difference, for that is equally required in a bailable writ, a rule for a special jury, or to compute principal and interest, all of which by the practice of the Court may be issued in vacation.

F. Pollock, in support of the rule, contended, that cause might be shown against a rule, for making a submission to arbitration a rule of court, and that there was no authority to compel a party to show cause before a Judge at chambers. As to judicial writs, they are at common law, and the practice of the Court may therefore regulate them. This case depends on the construction of a statute, and stands therefore on quite a different ground.

ABBOTT, C. J. If we were to grant the present application, we should do great mischief, inasmuch as the granting these rules in vacation, is a practice attended with much convenience to the suitors of the Court. It seems to me, that by construing the statute with reference to the ordinary practice of the Court, we shall give fuller effect to the intention of the legislature. The statute makes it compulsory on the Court, on the affidavit being produced, to make the submission a rule of Court. It is, therefore, merely a matter of form to apply for the rule. No injury is done to the other party by granting the rule, for the award cannot be enforced till the next term. All that is done, is, that a little time is gained by making the demand, and serving the rule of Court during the vacation, so as to enable the party to make an application for an attachment on the first day of the next term. If we were to overturn the practice in this case, we should establish a dangerous rule, for, by parity of reasoning, no consent rule in ejectment, no rule for special jury, or to pay money into Court, could be drawn

up in vacation. The consequence would be great delay in the administration of justice. This rule must therefore be refused.

Rule refused.

PHILLIPS v. HOWGATE.—p. 220.

In trespass, the first count of the declaration stated, that defendant assaulted and imprisoned plaintiff; and, during such imprisonment, struck, pulled, and pushed him about. Justification, that defendant arrested plaintiff under process of Court; and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c.: *Held*, that this latter part of the justification not being proved, the plaintiff was entitled to judgment; and, that it was not necessary to new assign the battery by the defendant.

Held, also, the second count of the declaration, (which omitted the battery) having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses, as laid in the first count.

TRESPASS. The first count of the declaration stated, that the defendant broke and entered the dwelling-house of the plaintiff, and assaulted and forced him out of his dwelling-house, and imprisoned him, and during such imprisonment, assaulted, struck, pulled, and pushed him about in a violent manner. The second count was for an assault and false imprisonment only; and the third count was for a common assault. The defendant pleaded, 1st, the general issue; and, secondly, as to the trespasses in the first count mentioned, he pleaded a justification under a writ of attachment, issued out of the Court of King's Bench, and a warrant of the sheriff thereon, under which he peaceably and quietly entered into the plaintiff's dwelling-house, and arrested the plaintiff and imprisoned him; and, *because the plaintiff, after he had been so taken into custody under and by virtue of the said writ and warrant as aforesaid, behaved and conducted himself in a violent and outrageous manner, and could not otherwise be kept in a safe and proper manner* by the defendant, he, the defendant, was obliged to push and pull about the said plaintiff with a little force and violence, and to give the plaintiff a few blows, and strokes, &c. He also pleaded a similar justification, omitting the latter part as to the battery, with respect to the second and third counts of the declaration. Replication, *de injuria*, &c., and issue thereon. At the trial, at the last assizes for the county of York, before BAYLEY, J., the defendant proved the arrest to have taken place in the manner alleged in his justification. But the plaintiff having proved a battery during the time that he was in the defendant's custody, the learned Judge thought it was necessary for the defendant to give some evidence of outrageous conduct on the part of the plaintiff when in custody, so as to prove the latter part of the defendant's first justification; and he finally left the question to the jury, whether what was done by the defendant was more than was necessary for the purpose of keeping the plaintiff safely in custody. The jury found a verdict for the plaintiff. And now,

I. Williams, by leave of the learned Judge, moved to enter a ver

dict for the defendant. In this case, the plea having justified the breaking and entering, and the arrest and the imprisonment of the plaintiff, and having, to that extent at least, been proved, is a full answer to the first count; for these circumstances are the gist of the action, and the battery is only matter of aggravation; and if the plaintiff meant to rely upon it, he should have done it by a new assignment, and that, it appears, was the opinion of BULLER, J., in *Taylor v. Cole*, 3 T. R. 297. It cannot signify that in his first justification the defendant alleges the outrageous conduct of the plaintiff as a ground for the battery, and so justifies the battery; for if what is proved amount to a sufficient justification, the having alleged other matter, not proved, will not vitiate it. *Spilsbury v. Micklethwaite*, 1 Taunt. 146. Besides, the justification to the second count was completely proved, and only one assault was proved, and the defendant may, therefore, apply the justification to that.

ABBOTT, C. J. I am of opinion, that in this case the Court ought not to grant the rule. If this question were considered upon the first count of the declaration alone, it seems to me that the plaintiff would be clearly entitled to a verdict. That count contains a charge of breaking and entering the plaintiff's house, and of assaulting and imprisoning him, and, during the imprisonment, of pushing, striking, and pulling him about. To this count there is a justification; and it is contended, that the whole of the above trespasses are justified by proof being given of a writ of attachment and a warrant to the defendant, as bailiff to execute that writ. Now, if so, I agree that the circumstance of the defendant's having put more into his justification, of which no proof has been given, will not vitiate it. But I am of opinion that the proof given is not sufficient to justify the trespass in pushing and striking the plaintiff. In order to justify that, it was necessary to prove that part of the defendant's justification in which he states, that the plaintiff resisted when in custody. That not being done, I think the justification was not proved, and that the plaintiff would be entitled to a verdict. This would be the case, if there had been only one count in the declaration, and one plea of justification. But there is a second count, to which there is a plea of justification, which has been established. That count, however, was quite unnecessary for the plaintiff's case; and I think it can make no difference. Here, the plaintiff has, in his first count, stated the whole injury which he has received, and that count has not been justified. He is, therefore, entitled to a verdict.

BAYLEY, J. The plaintiff proved, at the trial, the whole of his first count. The plea of the defendant, if true, would have been a good justification; and, as it seems to me, it was necessary to allege the misconduct of the plaintiff, in order to justify the pushing and striking by the defendant. For, if it had omitted such an allegation, the plea would have been demurrable. The justification, though well pleaded, was not sufficiently proved; and the plaintiff, therefore, was entitled to a verdict.

BEST, J.,* concurred.

Rule refused

* Holroyd, J., was at Chambers.

DOE, on the Demise of HUMAN, v. PETTETT.—p. 223.

The declarations of a widow in possession of premises, that she held them for her life, and that after her death they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had twenty years' adverse possession.

EJECTMENT, for certain premises at Fordham, in the county of Cambridge. Plea, general issue. At the trial, before Dallas, C. J., at the last Summer assizes for that county, it appeared that John Human was the original purchaser of the premises, and that after his death, about thirty years ago, his widow continued in possession for about twenty years, and then died. The defendant was the heir at law of the widow, and the lessor of the plaintiff was the heir at law of John Human. In order to show that the widow's possession was not adverse, the learned Judge admitted evidence of her declarations during her possession of the premises, showing, that she held the premises for her life, and that after her death, they would go to the heirs of John Human. The plaintiff had a verdict; and now

Blossett, Serjt., moved to enter a nonsuit, upon the ground that these declarations were not admissible. The declarations of a tenant for life are not admissible, to show the extent of his interest. Such declarations, in order to be receivable as evidence, must be, when made, against the then present interest of the parties making them. *Peaceable v. Watson*, 4 Taunt. 16, *Doe v. Jones*, 1 Campb. 367. In Comyns's Digest, tit. *Seisin*, F. 1, it is laid down, "that if a man enters by a disseisin, he will be a disseisor, though he claims only for years, as tenant by statute, in dower, &c., where they have no right to it; for they cannot qualify their wrong." Here, the declarations of the widow, if she had no right, would go to qualify her wrong, and if she had a right, they would be inadmissible, as being in favour of her own interest, upon the ground previously stated.

ABBOTT, C. J. All questions of evidence must be considered with reference to the particular circumstances under which it is offered. Here, the question was, whether the widow had occupied the premises adversely, for more than twenty years, and her declarations are offered in evidence to rebut the statute of limitations; and for that purpose, I think they were admissible. They were not used to show the quantum of her estate, but only to explain the nature of her possession.

Rule refused.

RAYNER v. GODMOND.—p. 225.

Where, during the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water; and the ship, in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, went by accident on some piles, which were not previously known to be there: *Held*, that this was a stranding within the usual memorandum in the policy, the accident having happened not in the ordinary course of such voyage.

ACTION on a policy of insurance on the ship *Neutral*, from Wisbeach to Leeds or Wakefield. The policy was on 230 quarters of wheat, valued at 900*l*. It contained the usual memorandum at the foot, "Corn, &c., warranted free from average, unless general, or the ship be stranded." At the trial, at the last sittings at Guildhall, before BEST, J., the only question was, whether the ship had been stranded. As to that, the facts were as follows. The ship having sailed from Wisbeach, arrived safely at Selby, where, having taken out her anchors, stores, &c., she proceeded up the navigation towards Wakefield. In the course of the voyage, she arrived at a place called Beal Lock, and whilst she was there, it became necessary, for the purpose of repairing the navigation, that the water should be drawn off. The master placed the vessel in the most secure place he could find, alongside of four other vessels. In this he was assisted by the lock-keeper. The water being then drawn off, all the vessels grounded, and, unfortunately, the ship *Neutral* grounded on some piles in the river, which were not known to be there, and the cargo received considerable damage. The part of the navigation where she took the ground was one in which vessels usually were placed when the water was drawn off. The learned Judge was of opinion that these facts amounted to a stranding, and the plaintiff had a verdict. And now,

Campbell moved for a new trial. He contended, that in this case, there was no stranding. Here, the vessel was intentionally brought into this position, and it is impossible she can be considered as stranded, unless all the other four ships with her were equally so; for the mere circumstance of the additional damages to her, cannot make a difference. *Burnett v. Kensington*, 7 T. R. 210. The case of *Dobson v. Bolton*, Marshall on Insurance, 239, sittings after Easter term, 1799, comes nearest to this. But there the vessel in the Wisbeach River was driven on the piles by the perils of the sea. Here there was no such thing. This was like the case of a vessel in a dry harbour, or of those which are continually laid on the mud in coming up the Thames. But in those cases it has never yet been considered that ships are stranded, and the underwriters liable for an average loss. In *Hearne v. Edmunds*, 1 B. & B. 388, the Court held, that where a vessel took the ground in going up the river at Cork, in the ordinary course of navigation, and was damaged, it was not a stranding for which the insurers were liable. Here it was in the ordinary course of this sort of navigation, that the accident happened. *Carruthers v. Sydebotham*, 4 M. & S. 77, is indeed near this case; but that decision is questionable, and ought not to be carried further.

ABBOTT, C. J. The case of *Hearne v. Edmunds* has relieved my mind from the only remaining difficulty which I felt in this case, which was, lest it should follow, from our decision, or from that of *Carruthers v. Sydebotham*, that every settling on the ground by a vessel should be deemed a stranding; but that case was decided on a distinction which leaves *Carruthers v. Sydebotham* a valid authority; for there the accident happened in the ordinary course of the voyage; and on that ground the underwriters were held not to be liable. Here the

loss did not so happen, for we cannot suppose that these canals are so constantly wanting repair, as to make the drawing off the water an occurrence in the ordinary course of a voyage. I think, therefore, that, in this case, the vessel was stranded, and that there is no reason for disturbing the present verdict.

BAYLEY, J. This was an insurance on a perishable commodity, and the object of the memorandum was to exempt the underwriters from loss, unless there was an adequate cause for it. If, however, the ship was stranded, they were to be liable. The case of *Carruthers v. Sydebotham* is very like this. There, on the ebbing of the tide, the ship fell over and received damage, and the Court held that it amounted to a stranding, because the ship was upon the strand. In *Hearne v. Edmunds*, the ship never was on the strand, within the meaning of the parties; for there, in the ordinary course of the voyage, it was quite certain that the vessel would, by the regular flux and re-flux of the tide, be left on the mud. And the fair construction of the words of this memorandum, which reconciles that case with *Carruthers v. Sydebotham*, must therefore be, that when, in the ordinary course of the voyage, the ship must go on the strand, the underwriter is exempt; but where it arises from an accident, and out of the ordinary course, he is liable. That was the case here, and, therefore, the verdict is right.

BEST, J.* If *Carruthers v. Sydebotham* had been broken in upon by subsequent decisions, it might, perhaps, have been necessary to reconsider it; but the case of *Hearne v. Edmunds*, in the Common Pleas, has confirmed it. Here, the accident producing the loss was one not to be expected. In the case in the Common Pleas, the event must happen every tide. I think a stranding may properly be said to take place, where a ship, by accident, and not in the ordinary course of the voyage, is rendered immoveable on the strand.

Rule refused.

* Holroyd, J., was absent at Chambers.

WILSON and Another v. COUPLAND and Another.—p. 228.

Where the plaintiffs were creditors and defendants debtors to T. and Co., and by consent of all parties, an arrangement was made that defendants should pay to plaintiffs the debt due from them to T. and Co.: *Held*, that as the demand of T. and Co. on defendants was for money had and received, the plaintiffs were entitled to recover, on account for money had and received, against the defendants.

ASSUMPSIT. The declaration contained two special counts, and a count for money had and received, an account stated. Plea, general issue. At the trial, at the last Guildhall sittings, before ABBOTT, C. J., the facts appeared to be these: The defendants were indebted to Taillasson and Co. in the sum of 768*l.* upon the balance of accounts, of money had and received; Taillasson and Co. were indebted to the plaintiffs in a much larger amount; and, being so, they inclosed to the plaintiffs the account current, rendered to them by the defendants, accompanying it with a memorandum at the foot, transferring to the

plaintiffs the balance of 768*l.* then due. This being notified to the defendants, a long correspondence between them and the plaintiffs took place, and in the result the defendants, who were creditors to the amount of upwards of 4000*l.* of Taillasson and Doussard, (two of the firm of Taillasson and Co.,) finding that they could not set off the one debt against the other, sent to the plaintiffs the following note, dated 14th August, 1820; "Three months after date we promise to pay to Messrs. Wilson and Blanshard, or order, seven hundred and sixty-eight pounds, due to Taillasson and Co., unless otherwise provided for by an arrangement with Mr. Colton, in St. Lucia, in favour of Messrs. W. and B." No arrangement was afterwards made in St. Lucia, in favour of Wilson and Blanshard; but Mr. Colton in St. Lucia, made an arrangement, and got the following receipt, dated 12th September, 1820, from Taillasson and Co.: "We acknowledge to have received from Messrs. W. Coupland and Co., the sum of seven hundred and sixty-eight pounds sterling, for balance of account due to us on the thirty-first December last: which said sum is to be deducted from the balance of account due to them by Taillasson and Doussard on the date aforesaid." ABBOTT, C. J., was of opinion, at the trial, that on the 14th August, 1820, the defendants were to be considered as debtors to the plaintiffs in the sum of 768*l.*, to be paid in three months, subject only to the possibility of intermediate arrangements in favour of Wilson and Blanshard, being made by Mr. Colton, at St. Lucia, and that no such arrangements having been made, the plaintiffs were entitled to recover upon the count for money had and received. The plaintiffs accordingly had a verdict. And now,

Marryat, by leave, moved to enter a nonsuit. The question is here, whether money had and received will lie. For the plaintiffs failed altogether in the proof of their special counts. The case on which the plaintiffs rely is that of *Israel v. Douglas*, 1 Hen. Bl. 289. But that case is of doubtful authority. WILSON, J., there doubted whether money had and received would lie; and in *Taylor v. Higgins*, 3 East, 169, LAWRENCE, J., stated that that decision had not been approved. Here no money has passed between the parties. In *Mazwell v. Jameson*, 2 B. & A. 51, the Court held that money paid would not lie, unless money had actually passed. In *Barclay v. Gooch*, 2 Esp. N. P. C. 571, a note was given and accepted as money, and on that ground the action was held to be maintainable. This case is in effect the assignment of a chose in action. And it is distinguishable from *Israel v. Douglas*, supposing even that that case is law; for there there was an absolute promise by Douglas to pay the amount due from him to Delvallè; but here the promise is a conditional one, viz. in case no arrangement be made in St. Lucia. Besides, there must be a consideration for the promise, either of detriment to the plaintiffs, or of advantage to the defendants. Now, there was no detriment to the plaintiffs; for there was nothing in the terms of the note to prevent them from suing Taillasson & Co. for the whole debt due to them. And there was clearly no advantage to the defendants.

ABBOTT, C. J. I was not free from doubt at the trial, but I am now satisfied that the verdict is right. The facts are these: The plaintiffs were creditors, and the defendants debtors, to Taillasson and Co.; and, by the consent of all parties, an arrangement was made, that the defendants should pay to the plaintiffs the debt they owed to Taillasson and Co., and as the demand of Taillasson and Co. on the defendants was for money had and received, it seems to me that the defendants, by acceding to this arrangement, made themselves liable for money had and received to the use of the plaintiffs. Thus the case stands, independently of the note. But it seems to me that the note makes no difference: for although it might, perhaps, be at first conditional, yet, afterwards, the condition ceasing, it became an absolute promise; and, if so, the defendants have absolutely acceded, and are liable to the consequences of the arrangement. The verdict, therefore, is right.

BAYLEY, J. The legal effect of what has taken place is this; Coupland and Co. are indebted to Taillasson and Co. to the amount of 768*l.* for money had and received. The latter being indebted to the plaintiffs, a bargain takes place, by which Taillasson and Co. agree, that the money had and received by the defendants to their use shall be money had and received to the use of the plaintiffs. To this arrangement the defendants assent. Then their assent makes them debtors, and liable to an action of money had and received to the use of the plaintiffs. The agreement of the 14th August seems to me to be absolute, and not conditional. It is in effect an agreement to give the defendants three months, in which to pay the balance, which is an advantage to them; and the defendants agree to pay it then in England, unless the plaintiffs are, in the mean time, paid in the West Indies. That is, as it seems to me, an absolute promise. I am therefore of opinion, that this action is maintainable, and that there ought to be no rule.

HOLROYD, J., concurred.

BEST, J. A chose in action is not assignable without the consent of all parties. But here all parties have assented, and from the moment of the assent of the defendants, it seems to me that the balance of 768*l.* became money had and received to the plaintiffs' use. It is said that the promise was conditional. That may, perhaps, be doubtful; but supposing it to be conditional, the event has happened upon which it became absolute.

Rule refused.

DOE, on the Demise of FENWICK and Others, v. REED.—p. 232.

Where a defendant's ancestor came into possession of certain lands in 1752, as a creditor under a judgment obtained against the then owner of the land, and defendant's family had continued in possession ever since: *Held*, that the original possession having been taken, not under any conveyance, the length of possession was only prima facie evidence, from which a jury might infer a subsequent conveyance by the original owner, or some of his descendants, but that it might be rebutted, and that the jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed.

EJECTMENT for several messuages and lands in the parishes of Simonburn, Wark, &c., in the county of Northumberland. In the year 1747, Edward Charlton, Esquire, under whom the plaintiffs claimed, being indebted to John Rooke, to the amount of 850*l.*, for which debts Rooke had obtained judgment, it was agreed between them, that Rooke should be put into the possession of the rents and profits of the estate in question, until the debts should be satisfied thereout, which agreement was carried into effect, and Rooke entered into and remained in possession until 1752. Edward Charlton, being at that time indebted also to John Reed, under whom the defendant claimed, Reed was desirous of getting into the possession of the estates held by Rooke, and by a certain indenture of assignment between Rooke and Reed, the former assigned over all the debt then remaining due, and his right of possession to the estates in question, upon payment to him of the sum of 575*l.* Under this agreement, Reed entered into possession, and he and his family have continued so ever since. In the year 1801, a suit in Chancery was instituted by the Charlton family, to recover possession of the estates, upon which, in 1821, the Vice Chancellor directed the present action to be brought, prohibiting the defendant from setting up as a defence, that the debts due or assigned to John Reed, deceased, were paid 20 years ago, or that the same were still unpaid. At the trial, it was proved, in addition to the before-mentioned circumstances, that the title deeds relative to these estates, (which deeds, however, extended to other estates also,) were still in the hands of the Charlton family, and that the lands being copyhold of the manor of Wark, the name of Rooke had remained upon the manor books till within a few years, having first appeared there in 1752. It appeared also, that moduses had been paid by the steward of the Charlton family, to the then rector of Simonburn, in 1779, for several estates, including some of the estates in question. There was no distinct evidence of their value. Edward Charlton died in 1767, leaving a widow and a son then under age. The son, William Charlton, married in 1778, and died in 1797, leaving a son an infant. The question for the jury was, whether, under these circumstances, a conveyance of these estates, either from Edward Charlton or William Charlton to the Reed family, might be presumed. BAYLEY, J., who tried the cause at the last assizes for the county of Northumberland, in summing up the case, after adverting to the different facts above stated, told the jury, that the real question for them to consider was, whether they believed that a conveyance had actually taken place; observing, that the loss of a deed of conveyance was less likely to take place, than of a grant of a right of way. And that, during the marriages of Edward and William Charlton, no conveyance could have been made without levying a fine; which being of record, might have been produced, if it had existed. The jury found for the lessor of the plaintiff. And now,

Hullock, Serjt., moved for a new trial, on the ground of misdirection. The true criterion by which to judge in these cases, is laid down by Lord MANSFIELD in *Eldridge v. Knott*, Cowp. 215, where he says, "There are many cases not within the statute of limitations, where, from a principle of quieting possession, the Court has thought that a

jury should presume any thing to support a length of possession. Lord COKE says, that an act of parliament may be presumed, and even in the case of the crown, which is not bound by the statutes of limitations, a grant may be presumed from great length of possession. It was so done in *The Mayor of Hull v. Horner*, Cowp. 102. Not that in such cases, the Court really thinks a grant has been made, because it is not probable, that a grant should have existed without its being on record, but we presume the fact, for the purpose, and from a principle of quieting the possession." This then is the true principle which ought to have been presented to the jury in this case. And in *Keymer v. Summer*, Bull. N. P. 74, YATES, J., directed the jury to presume a grant of a right of way from a possession of nearly 80 years, although it appeared, there had been an absolute extinguishment of the right of way some years back by unity of possession. If the law is to be, as stated here, it will be open in every case of a right of way, or of the enjoyment of ancient lights or water, to go to the jury on the question, whether, although possession for 20 years has been proved, they believe, that in fact any grant was ever made, and evidence of the cautious or imprudent character of the supposed grantor will be receivable. This will, in all probability, make such possession very doubtful; for no one really supposes that such grants have any existence. Besides, if the jury do really suppose a grant to have been made, the length of possession is immaterial. And there was no use in the courts laying down as a rule, that 20 years' possession would warrant a presumption. As to the observations made with respect to the fines, they were not correct. For if there had been, as probably there was a settlement on the respective marriages of Edward and William Charlton, there would have been no necessity for a fine. Possibly that observation, however, may have produced the verdict. *ner*, Cowp. 102; *Keymer v. Summer*, Bull. N. P. 74.

ABBOTT, C. J. I am clearly of opinion, that the direction was according to law. In cases where the original possession cannot be accounted for, and would be unlawful, unless there had been a grant, the rule may perhaps be different; and all the cases cited are of that description. Here, the original possession is accounted for, and is consistent with the fact of there having been no conveyance. It may, indeed, have continued longer than is consistent with the original condition. But it was surely a question for the jury to say, whether that continuance was to be attributed to a want of care and attention on the part of the Charlton family, or to the fact of there having been a conveyance of the estate. As the defendant's ancestors had originally a lawful possession, I think it was incumbent on him to give stronger evidence to warrant the jury in coming to a conclusion, that there had been a conveyance. As to the observations made respecting the fine, &c., I think the Judge might properly tell the jury, that, under such circumstances, they would probably find a fine levied. It is said now, that there might be a settlement, and that he ought to have mentioned that circumstance also to the jury. But it would be a new ground for a new trial, to say, that a Judge had not made every observation to the jury, which the ingenuity of counsel could suggest on behalf of their

client. I think the point presented to the jury was the correct one. In my opinion, presumptions of grants and conveyances have already gone to too great length, and I am not disposed to extend them further.

BAYLEY, J. I thought at the trial, and I think still, that the question for the jury was, whether in fact a conveyance had ever been made. I considered it as a mere question of fact, and I called their attention to such circumstances as I thought tended to prove, or to negative it. The deeds of 1747 and 1752, were both produced, and if there had been a conveyance, it would probably have been produced also. No draft of it, or abstract referring to it, was produced. A conveyance of this sort was not likely to have been lost, if it had ever existed. It seemed to me, that the verdict was right, and that if the jury had decided otherwise, most mischievous consequences might have resulted.

HOLROYD, J. Here the original enjoyment was consistent with the fact of there having been no conveyance, for it was in satisfaction of a debt. The true question was presented to the jury. In cases of rights of way, &c., the original enjoyment cannot be accounted for, unless a grant has been made; and therefore, it is, that, from long enjoyment, such grants are presumed. But even in these cases, evidence to rebut such a presumption would be admissible. I think that the direction of my Brother Bayley was correct, and that the verdict is right.

Rule refused.*

* Best, J., absent at Chambers.

STEWART v. BELL.—p. 238.

Insurance from London to Jamaica generally. The goods insured were destined to a particular place in the island, and the usual course in such cases was for the ship to proceed to an adjoining port, and there to trans-ship the cargo into shallops; but no information of this was given to the underwriters: *Held*, notwithstanding, that they were liable for a loss occurring after such trans-shipment on board the shallops.

ACTION on a policy of insurance from London to Jamaica, upon goods on board the ship Nesbitt. Plea, general issue. At the trial, at the last Guildhall sittings, before Best, J., it appeared that the goods in question, were stores for the supply of a plantation called Duckenfield Hall estate, situate in Plantain Garden, River Bay, in Jamaica. The bay is not safe for vessels drawing so much water as the Nesbitt did. The usual course is for such vessels to proceed to Port Morant, and to discharge their cargo into shallops for the purpose of being conveyed to Plantain Garden, River Bay. The ship Nesbitt arrived at Port Morant safely, and put part of her cargo on board two shallops, which, in their passage to Plantain Garden, River Bay, were lost. For this the assured claimed an average loss. The *Solicitor-General*, at the trial, contended, that the fact of the goods being destined for Plantain Garden, River Bay, ought to have been communicated to the underwriters, and that they could not, upon a policy from London to Jamaica, be liable for a loss occurring after the trans-shipment of the

goods. *BEST, J.*, was of opinion, that it was incumbent on the underwriters to inquire, for what part of Jamaica the goods were destined; and left it to the jury to say, whether the loss occurred in the usual course of the voyage, telling them that, in that case, the underwriters were liable. The plaintiff accordingly had a verdict. And now,

The *Solicitor-General* moved for a new trial; and he referred to a case of *Ferguson v. Allen*, tried before Lord ELLENBOROUGH, at Guildhall sittings after Hilary term, 1806, as in point. There the insurance was on goods by the ship *Phoenix*, at and from London to Tobago, and the goods were intended for Castara Bay in that island, but Castara Bay not being safe in war-time, or for a ship the size of the *Phoenix*, she went on to Courland Bay, and sent the goods by a drogher, which was captured. There the underwriters were held not liable for the loss. That case is very similar to the present. The circumstance of the goods being transshipped, makes a considerable difference in the risk. No doubt, if the goods had been landed at Port Morant, the underwriters would have been liable for any loss by boats. Besides, the risk in droghers, when intended to be borne by the underwriters, is specially mentioned in the policy.

Per Curiam. The assured must show, that the port to which the ship proceeds is the usual port for goods destined to the particular place. That was so here, for Port Morant was the place to which ships of the burden and draught of water of the *Nesbitt* usually proceed with goods destined for Plantain Garden, River Bay. The underwriter is presumed to be acquainted with the usual course of the voyage, and to take a premium for the risk accordingly. The policy is to cover the goods till they are landed, and the underwriter should inquire, therefore, what is the usual mode of landing the goods insured. Here it appears to have been the usage to trans-ship the goods into shallows. The words "including risk in droghers" have probably been added to policies for greater security; but where it is the usage of the trade, and in the ordinary course of the voyage to trans-ship into droghers, the underwriters are liable, even though those words are not found in the policy.

Rule refused.

SHEPHERD v. KAIN.—p. 240.

Where an advertisement for the sale of a ship described her as "a copper-fastened vessel," adding, that the vessel was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened: *Held*, that notwithstanding the words "with all faults, &c." the vendor was liable for the breach of the warranty.

CASE for the breach of a warranty as to the character of a ship. The advertisement for the sale of the ship described her as "a copper-

fastened vessel;" but there were subjoined these words: "The vessel, with her stores as she now lies, to be taken with all faults, without allowance for any defects whatsoever." It appeared at the trial, at the last Guildhall sittings, before BEST, J., that the ship, when sold, was only partially copper-fastened, and that she was not what was called in the trade a copper-fastened vessel. It appeared, also, that the plaintiff, before he bought her, had a full opportunity to examine her situation. BEST, J., thought that the ship, not being a copper-fastened vessel, the plaintiff was entitled to a verdict, and directed the jury accordingly. And now,

The *Solicitor-General* moved for a new trial. He referred to the terms of the advertisement by which the vessel was to be taken, with all faults, and without any allowance for any defects whatsoever; and to the judgment of Lord ELLENBOROUGH in the case of *Baglehole v. Walters*, 3 Campb. 156. Here the term "copper-fastened" was only a description to the best of the seller's judgment.

But, *per Curiam*: The meaning of the advertisement must be, that the seller will not be responsible for any faults which a copper-fastened ship may have. Suppose a silver service sold "with all faults," and it turns out to be plated: can there be any doubt that the vender would be liable? "With all faults" must mean, with all faults which it may have consistently with its being the thing described. Here the ship was not a copper-fastened ship at all; and, therefore, the verdict was right.

Rule refused.

BURNYEAT v. HUTCHINSON.—p. 241.

A plaintiff, in an action for a tavern bill, is not entitled to recover for any items under 20s. for spirits supplied to the guests, such sales being prohibited by 24 G. 2, c. 40, s. 12.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial, at the last assizes for Cumberland, before BAYLEY, J., it appeared that the action was brought to recover the amount of a tavern bill, the charge for which amounted to 1*l.* 13*s.* There was also a charge for spirituous liquors supplied to the guests, amounting to 8*s.* To this charge it was objected, that it could not be recovered in consequence of 24 G. 2, c. 40, s. 12; and *Gilpin v. Rendle*, 1 Selw. N. P. 61, was cited. The learned Judge was of this opinion, and the jury, under his direction, having found a verdict for 1*l.* 13*s.*, he afterwards certified, in order to deprive the plaintiff of his costs.

D. F. Jones now moved to increase the verdict to 41*s.* by adding the charge for spirituous liquors. Here, the liquors were only incidental to the rest of the entertainment. The object of the statute was to prevent the sale to the consumers in small quantities, where spirits only were sold. It speaks of a collusion between the distiller and retailer, in order to extend the sale. If this be the rule, as here laid down, any

security given for a tavern bill, in which there was a charge of a glass of spirits, would be invalid; and so, indeed, it was held in *Scott v. Gilmore*, 3 Taunt. 226, where the spirits were supplied to the party. But in *Spencer v. Smith*, 3 Campb. 9, where the bill was given by an officer for spirits supplied to recruits, Lord ELLENBOROUGH was of a contrary opinion; and in *Jackson v. Attrill*, Peake, N. P. C. 180, where the spirits were supplied to the keeper of an eating-house, to be consumed by his customers, Lord KENYON held him liable. Here, the goods were supplied to other persons, and not to the defendant, who was not present at the entertainment.

ABBOTT, C. J. The words of the act are free from doubt. They contain a general and absolute prohibition of the sale of spirits, unless delivered in quantities amounting to more than twenty shillings in value at one time. We are, however, desirous to narrow the construction, by introducing the qualifications of a sale to the consumer himself, and by confining it to the case where the spirits have been sold alone. But it would be a great evil to introduce such qualifications; and I think, if we did so, we should probably defeat the intentions of the legislature. The verdict must remain as it is, with all its consequences.

Rule refused.

DOE, on the Demise of JAMES, v. BRAWN.—p. 243.

Where an assignment of a lease by deed, taken in execution, was made in the name and under the seal of office of the sheriff, by A. B., acting as under-sheriff: *Held*, that such assignment was sufficiently proved, without proving further the appointment of A. B., as under-sheriff, and that he had power by deed to execute deeds in the name of the sheriff.

EJECTMENT for certain leasehold premises. Plea, general issue. At the trial, before ABBOTT, C. J., at the last assizes for Gloucestershire, it appeared that a fieri facias had issued upon a judgment against the defendant, and that on that occasion a lease by deed of the premises in question, was taken in execution by the sheriff, and sold and assigned to the lessor of the plaintiff. The only question at the trial was, whether this assignment by the sheriff was sufficiently proved. The assignment was in the name of Mr. Miller, the high-sheriff, and was executed in his name, and under the seal of the office by Mr. Wilton, who acted as his under-sheriff. But there was no evidence of the appointment of Wilton, empowering him to execute deeds in the name of the high-sheriff. The learned Judge thought that Wilton's acting as under-sheriff, was sufficient evidence of his appointment, and that it must be presumed that he had authority to execute all instruments necessary to be executed by the high-sheriff, and the plaintiff accordingly had a verdict. And now,

Campbell, by leave of the learned Judge, moved to enter a nonsuit; contending, that there ought to have been further evidence that Wil-

ton was under-sheriff, and that he had authority by deed to execute deeds in the name of the high-sheriff.

But the Court thought that the evidence was sufficient, and that the under-sheriff had authority *virtute officii* to execute such instruments: and they refused the rule.

Rule refused.

RHODES v. GENT.—p. 244.

A bill of exchange was accepted, payable at Messrs. P. and H., bankers, London, but was not presented there for payment when due, nor until some days after; the acceptor is still liable, no inconvenience having resulted to him from the delay to present the bill.

ACTION against defendant, as acceptor of a bill of exchange drawn by the plaintiff, payable four months after date to the plaintiff's order, for the sum of 194*l*. The acceptance was as follows: "Accepted; payable when due, at Messrs. P. and H., bankers, London." The declaration contained an averment, that "afterwards, and when the bill became due, to wit, on, &c., at, &c., it was presented at the place at which it was by the said acceptance made payable, and payment demanded." At the trial, at the last Guildhall sittings, before ABBOTT, C. J., it appeared that the bill in question had not been presented for payment at Messrs. P. and H. till several days after it became due; and it was objected that, on this ground, the plaintiffs were not entitled to recover; but the Lord Chief Justice was of a different opinion. The plaintiffs having obtained a verdict upon this, and upon another bill of exchange, to the proof of which there was no objection.

J. Parke now moved to reduce the verdict, by deducting the sum of 194*l*. Here the bill was not presented when due. It is now decided that in an acceptance like the present, it is a part of the contract that the bill shall be presented at the particular place; *Rowe v. Young*, 2 B. & B. 165: and the question is, therefore, whether the law will not now annex to it also the condition of presenting the bill at the banker's within a reasonable time after it is due. A party, in order to take up the bill, deposits money at his banker's, and, if the bill be not presented for payment when due, or within a reasonable time after, he will be exposed to the inconvenience and risk of keeping the money there for a long period of time. And *Bishop v. Chitty*, 2 Str. 1195, is an instance of a loss occurring from this circumstance, where the acceptor was held not to be liable. *Sebag v. Abithol*, 4 M. & S. 462, was decided on the ground that it was not necessary to present the bill at all at the banker's, and being, as to that, overruled by *Rowe v. Young*, is not an authority against the application. Besides, here there is an averment in the declaration, that the bill was presented when due, which has been negatived.

ABBOTT, C. J. It does not seem to me that the particular averment in the declaration is at all material; for the bill being payable to the

order of the plaintiff, who was the drawer, it would, unless he was guilty of laches, be evidence on the account stated. The question, therefore, really is, whether a mere omission to present the bill at the banker's on the day when it is due, will discharge the acceptor; and, it seems to me, that if we were so to decide, it would produce most mischievous consequences. The case of *Rowe v. Young* goes the length of holding that a presentment is necessary at the particular place specified; and, perhaps, it may go further, and may exonerate the acceptor, in case by the omission to present in time, he sustains any actual prejudice; but it cannot extend to a case like the present, where no such injury is proved to have arisen in consequence of the omission to present the bill for payment when due. This rule must, therefore, be refused.

HOLROYD, J.* If this case fell within the rule laid down in the case of *Rowe v. Young*, we are no doubt bound by that decision; but I think it does not fall within it. The only cases in which parties have been held to be exonerated in consequence of non-presentment, are those of drawers and endorsers. This is an action against the acceptor, and, without saying what effect the proof of an actual loss sustained by him in consequence of an omission to present would have, I think he is clearly not exonerated in the present case, where no injury is proved to have arisen from what has occurred.

BEST, J. If I had thought that a consequence like that contended for was deducible from *Rowe v. Young*, I should have hesitated before I pronounced the opinion which I did in that case. If a bill be accepted, payable at a particular place, the acceptor undertakes to have the money there, and to leave it there till the bill is presented; and if he does so, and in consequence of that, by the failure of the banker, he receives an injury, I think he will be exonerated, if the bill has not been presented in due time. It is like the case of a check, which, if it be held till after the banker fails, will be considered as payment, in case the person giving it had money in the banker's hands at the time. I am satisfied that the case of *Rowe v. Young* cannot be considered as having imposed the condition contended for in the present case. This rule must, therefore, be refused.

Rule refused.

* Bayley, J., was absent at Chambers.

ALEXANDER v. SOUTHEY.—p. 247.

Where goods, the property of the plaintiff, had been, by the servants of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them up, refused to do so without an order from the company: *Held*, that this was not such a refusal as amounted to a conversion of the goods by the defendant.

TROVER, for printing types and other goods. Plea, general issue.

At the trial at the last Guildhall sittings before **BEST, J.**, it appeared, that the defendant, who was the servant of the Albion Insurance Company, had in his custody in a warehouse, of which he kept the key, certain goods belonging to the plaintiff, saved from a fire at the plaintiff's house, and which had been carried to the warehouse by the servants of the Company. The only evidence of a conversion was, that when the plaintiff demanded the goods from the defendant, the latter said that he could not deliver them up without an order from the Albion office. The learned Judge left it to the jury to say, whether this qualification of the defendant's refusal was a reasonable one, telling them, that if so, he was of opinion, that there was not sufficient evidence of a conversion. The jury accordingly found a verdict for the defendant. And now

DENMAN moved for a new trial, on the ground of a misdirection. Here, there was a tortious intermeddling with the plaintiff's goods, by the defendant's refusal to deliver them up. This was therefore a conversion, and *Perkins v. Smith*, 1 Wilson, 328, and *Stephens v. Elwall*, 4 M. & S. 260, were both instances where servants were held liable for a conversion, although it was done for the benefit of their masters. These authorities are in favour of the plaintiff in this case.

ABBOTT, C. J. I am of opinion, that in this case there should be no rule. *Perkins v. Smith* and *Stephens v. Elwall* were both cases of actual conversion by servants, in disposing of goods the property of others, to their master's use; but, here the question is, whether the refusal of the servant to deliver the goods in question amounts to a conversion of the property. This, therefore, is the case of a conversion arising by construction of law. I think the refusal in this case, not being an absolute refusal, was not sufficient evidence of a conversion, and that the learned Judge was right in so considering it, and in directing the jury to find a verdict for the defendant.

BAYLEY, J. If the plaintiff in this case had informed the defendant, that he had previously made application to the Insurance Company, and that they had refused permission for the delivery of the property, or had told the defendant, that he expected him to go and get an order, authorizing the delivery of the property, and after that, the defendant had refused, either to deliver the goods or to go and get such order, I think it would have amounted to a conversion on his part; but here the defendant had the goods in his possession as the agent of the Insurance Company, and he would not have done his duty if he had given them up without an application to his employers. He only gave, as it seems to me, a qualified, reasonable, and justifiable refusal.

HOLROYD, J. I think the verdict in this case was right. In point of law, the goods were only in the custody of the defendant, and in the possession of his employers, the Insurance Company. If we were to hold this refusal to be a conversion, it would go this length, that if a person were to call at a gentleman's house, and to ask his servant to deliver goods to him, and the servant were to refuse to do so, unless a previous application were made to his master, it would amount to a conversion on the part of the servant. In this case, the goods came into

the defendant's possession lawfully, and the refusal is only till an order is obtained from the defendant's employers. In *Perkins v. Smith*, the defendant received the goods wrongfully at first, and the conversion was by an actual sale of them. Now it is clear, that the authority of the master would not amount to a defence of that which was altogether a tortious act of the servant. The case of *Mires v. Solebay*, 2 Mod. 242, is an authority in point. There, the servant refused to deliver back some sheep which were on his master's land; and it was held to be no conversion on his part. I am, therefore, of opinion, that the rule should be refused.

BEST, J. I thought at the trial, that I might properly have nonsuited the plaintiff, but that the safer course was to leave the question to the jury. An unqualified refusal is almost always conclusive evidence of a conversion; but if there be a qualification annexed to it, the question then is, whether it be a reasonable one. Here, the jury thought the qualification a reasonable one, and that the refusal did not amount to a conversion of the property, and I think they were right in that conclusion.

JAMESON and Another v. CAMPBELL.—p. 250.

Where a bond was given under 4 G. 3, c. 33, s. 1, by a member of parliament, being a trader, and, after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given: *Held*, that the bankruptcy and certificate were no discharge to the bond.

DEBT on bond. The defendant pleaded his bankruptcy and certificate, the latter being dated 22d June, 1819. The replication set forth the condition of the bond, by which it appeared to have been a bond with sureties given under 4 G. 3, c. 33, s. 1, conditioned for the payment of such sum as should be recovered in a certain action, then pending in the Common Pleas between the plaintiffs and defendant, together with such costs as should be given in the same. And it then averred, that after the bankruptcy, to wit, in Easter term, 59 G. 3, judgment was given in that action in the Common Pleas against defendant, for the sum of 289*l.*, and so the bond forfeited by non-payment of that sum. Demurrer and joinder. This case was argued in last Easter term by

Wilde, in support of the demurrer. This bond given under 4 G. 3, c. 33, s. 1, was a mere collateral security, and is discharged by the bankruptcy and certificate. The difficulty arises from confounding the security and debt. The debt is not contingent, although the security is so. The moment the debt was ascertained by the judgment, it became by relation, a debt due before the bankruptcy, and as such, it was provable under the commission, and is discharged by the certificate. The security is indeed, contingent, and depends on the event of the judgment. Here, the original debt has been released by the certificate, and the bond, which was only a security for it, cannot now be

enforced. Co. Litt. 291 b. For the certificate may be considered as a statutory release of the debt, *Vansandau v. Corbie*, 3 B. & A. 13, *Scott v. Ambrose*, 2 M. & S. 326. In *Hunter v. Campbell*, 3 B. & A. 275, the Court only decided, that they would not interfere, on motion, in a case like the present. This case is analogous to bail, where the Court relieved the bail on motion, when the principal debtor has obtained his certificate.

Parke, contra, referred to the statute 7 G. 1, c. 31, as the authority by which bonds were first made provable, and to *Callowell v. Clutterbuck*, cited in *Tully v. Sparkes*, 2 Str. 867, as proving that point. Under that statute, however, the time of payment must be certain, for a rebate of interest is to be calculated, *Ex parte Barker*, 9 Ves. jun. 110. Here the time is clearly contingent, for it could not be ascertained when judgment would be given. There are many cases where it depends on the nature of the security, whether it be barred by the certificate, as, for instance, an annuity bond, and a covenant to secure the annuity, if the bond be forfeited before the bankruptcy, it may be proved. But in an action on the covenant for not paying subsequent instalments, the certificate would be no bar. *Cotterel v. Hooke*, Dougl. 97, *Ex parte Granger*, 10 Ves. jun. 351. So a certificate obtained subsequently to the judgment in an action on a bail bond, was held not to discharge the bankrupt from the judgment; the bail bond not having been forfeited at the time of the bankruptcy, *Cockerill v. Owston*, 1 Burr. 436, although it was there admitted, that the original debt was thereby discharged. Here the certificate was obtained after the judgment in the Common Pleas, and *Bouteflower v. Coats*, Cowp. 25, and *Dinsdale v. Eames*, 2 B. & B. 8, show that in such a case it is no bar. Nor will this be any hardship on the defendant, for, by suing the sureties, who are clearly liable, he may be made liable circuitously, and the law abhors circuity of action.

Wilde, in reply, referred to *Utterson v. Vernon*, 3 T. R. 546, as showing that 7 G. 1, c. 31, was a declaratory act. The cases as to bail bonds are distinguishable, for the condition of the bail bond is not, as here, to pay the debt, but to do a collateral act.

Cur. adv. vult.

ABBOTT, C. J., now delivered the judgment of the Court; and, after stating the pleadings, proceeded as follows:—This case was argued before us in the last Easter term. It is an action on a bond, given in pursuance of the statute 4 G. 3, c. 33, which has been since amended and rendered effectual by the statute 45 G. 3, c. 124. It appears by the pleadings that the plaintiffs having recovered judgment in the original action on a bill of exchange, the debt and costs remaining unpaid, afterwards brought their present action. Pending the proceedings in the original action, and before judgment obtained therein, the defendant became a bankrupt, and a commission was taken out against him, under which commission, but not before judgment in that action, he obtained his certificate. This certificate undoubtedly operated as a discharge in law from the debt due on the bill of exchange, and also from the costs of the action upon the bill; the costs being considered,

as to this point, only as an accessory to the debt. And it was contended on the part of the defendant, that being thus discharged from the payment of all that was recovered by the judgment in the first action, he is, by consequence, discharged also from the bond given to secure the payment of what should be so recovered. But we think this consequence does not follow from the premises. There may be two securities for the same payment, one of which shall be barred by a certificate, and the other not barred. Thus, if the grantor of an annuity executed a deed of covenant for payment of the annuity as it should from time to time accrue due, and also a bond in a penal sum, with a condition for the like payment, if the bond was forfeited, so as to make the penalty a debt at law before bankruptcy, a certificate afterwards obtained discharged the grantor from all suit on the bond, as well for future as prior payments of the annuity; but such a certificate did not discharge him from his deed of covenant, as it respected future payments, until the statute 49 G. 3, c. 121, was passed.

So, if a person, being arrested, give a bail-bond, conditioned for his appearance in court to answer in a suit for a debt, and become bankrupt between the execution of the bond and the time of appearance, so that the bond is not forfeited before his bankruptcy, if he do not afterwards appear to the suit, whereby the bond becomes forfeited, and an action be brought upon it, and he obtain his certificate after judgment in that action, the certificate, although it operates as a discharge from the debt for which the original action was brought, does not operate as a discharge from the judgment obtained in the action upon the bond.* It is true, that the condition of such a bond is not for payment of the debt; but nevertheless the bond is, in effect, a security only for such payment; and, although a judgment in the action on the bond be given for the penalty, yet execution can be taken out only for the original debt, together with costs, and not for the full penalty of the bond. And we think the bond in question is more analogous to a bail-bond than to any other instrument or deed in common use. The defendant was a member of parliament, privileged from arrest; and, consequently, could neither be required to give a bond to any sheriff for his appearance to an action, nor to give bail in court to any action in the usual way. This was found to be inconvenient; because a trader, who happened to be a member of parliament, being relieved from the fear of personal arrest, might for a long time avoid the committing any of the usual acts of bankruptcy, and thereby delay his creditor from the relief afforded by a commission of bankrupt. To remedy this inconvenience, the statute 4 G. 3, c. 33, was passed, which, upon a bill filed in court, on an affidavit of debt, and other circumstances therein mentioned, requires the trader, within two months after personal service, to pay, secure, or compound for the debt, or to give a bond with sureties like the present; or, in default, provides, that he shall be accounted a bankrupt, and subjected to a commission at the suit of any creditor. A bond so given was undoubtedly intended as a substitute for that security, which, in other cases, is obtained through the medium of an

* *Cockerill v. Owston*, 1 Burr. 436.

arrest, though the statute is imperfectly framed with a view to the intended object. The effect of a certificate to discharge a bankrupt from a judgment obtained between bankruptcy and certificate, depends upon the provisions of the statute 5 G. 2, c. 30, ss. 7 and 18. Those provisions are, in their terms, confined to the original judgment, and do not extend to a security given for payment of the sum that may be thereby recovered. And, therefore, the persons who become bail in court cannot plead in their discharge the certificate of their principal; and the ground upon which the courts relieve them, on motion, is, that the bankrupt, if surrendered by them in performance of their recognisance, is entitled to his immediate discharge; and to oblige them to surrender him, in order to relieve themselves, would be a vexation to him, and a useless expense to all parties. But considering the effect of a bond like the present with reference to the law as it stood before the provisions respecting sureties, introduced by the statute 49 G. 3, c. 121, the persons who joined as sureties in such a bond had no means of relief. They were undoubtedly liable to an action on the bond; and if compelled to pay, under the circumstances of the present case, might undoubtedly have sued the bankrupt for reimbursement; so that if he should have been held discharged from a direct action upon the bond against himself, he would not have been discharged from the effect and consequences of the bond, but might have been made liable indirectly, through the medium of his sureties, and for their reimbursement. And circuitry of action is always to be avoided, which would afford an additional reason for holding him liable directly, and in the first instance, by an action against himself on the bond. And as we think this case must be decided, with reference to the law as it existed before the statute 49 G. 3, it is not necessary to consider the effect of that statute, which, whatever it may be, is certainly confined to matters between the sureties and their principal, and does not touch the rights or remedies of the original creditor. For these reasons, we are of opinion that judgment should be given for the plaintiffs.

Judgment for the plaintiffs.

COVERLY v. BURRELL.—p. 257.

By a public act the Waterloo Bridge Company were authorized to raise money for the purpose of completing their undertaking, either among themselves, or by the admission of new members, or by granting annuities for a term of years, or for life. The act did not contain any provision that the annuities should or should not be redeemable. The Company, however, in the original grant, reserved to themselves a power of redemption: *Held*, under these circumstances, that an auctioneer, putting up to sale one of these annuities, was bound, in his particulars of sale, to describe it as a redeemable annuity.

Assumpsit for money had and received, to recover from the defendant, an actioneer, the amount of a deposit paid on the sale of an annuity. The cause was tried at the London sittings after Michaelmas

term, 1817, before Lord ELLENBOROUGH, C. J., when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

On the 20th June, 1817, the defendant put up for sale the annuity in question, under the following printed particulars: "Waterloo Bridge annuities. Particulars and conditions of sale of an annuity, payable out of, and secured on, the tolls of the Waterloo Bridge, which will be sold by auction by the defendant, at Garraway's coffee-house, pursuant to an order of commissioners of bankrupt. Lot 1, an annuity of 64*l.* per annum, payable half-yearly, well secured, and payable on the *first* tolls arising from that valuable concern the Waterloo Bridge, which will open for passengers on the 18th day of this month, with interest thereon." At the sale the plaintiff was the highest bidder, and was declared the purchaser of lot 1 for 580*l.* and immediately paid his deposit on that amount, agreeably to the conditions of sale, and signed a memorandum of the contract. The defendant was employed in his character of auctioneer, to sell the annuity in question, which had been granted by the Waterloo Bridge Company to one Stephens, a bankrupt. By the deed of grant, it appeared that the company reserved to themselves a right to redeem the annuity at the expiration of five years.

Sugden, for the plaintiff. The auctioneer ought to have disclosed by his particulars the redeemable quality of this annuity. The purchaser might fairly assume that it was irredeemable, especially as the act of parliament enabling the commissioners to grant these annuities, although it contains a form of grant, does not expressly give a power of redemption. He was then stopped by the Court.

Barnewall, contra. The rule of law, "caveat emptor," applies to this case. The annuity was granted originally by the Waterloo Bridge Company, for the purpose of raising money to enable them to carry on a great public undertaking; and although a power of redemption does not necessarily belong to every annuity, yet it almost universally attaches to an annuity granted for such a purpose; for the mode of raising money by annuity is resorted to only when it cannot be obtained upon mortgage or by other means. The circumstances under which this annuity was granted must be taken to have been known to the purchaser; for it was granted originally under the provisions of a *public* act of parliament, the 53 G. 3, c. 184. By section 6 of that act, the company are authorized to raise 200,000*l.* for the purpose of completing their work, either among themselves or by the admission of new subscribers; by section 7 they are authorized to raise it by mortgage; and by section 8 by granting annuities payable out of the rates, either for a term of years or for life. The purchaser, therefore, in this case, must be considered to have known that he was purchasing an annuity for life or years (which would pay him 11 per cent. on his purchase-money), originally granted by persons for the purpose of enabling them to carry on a great public work. He ought, therefore, to have known that the original grant of an annuity must, according to the common course of such dealings, have contained a power of redemption; or, at least, that fact was so very probable as to throw upon him the obligation of making inquiry upon the subject.

ABBOTT, C. J. I am of opinion that the plaintiff is entitled to recover. It is of great consequence to the public that auctioneers, who take upon themselves to describe in their particulars the property to be sold, should truly describe it: for the buyers act on the faith of those descriptions. We ought not, therefore, to be astute in curing the defects which are apparent on the face of the particulars. It is true that an annuity may be redeemable, but it is not necessarily so; and it is not redeemable unless there be a special provision to that effect in the deed granting it. The purchaser had no reason to suppose, in this case, that the annuity was redeemable. He could not have learnt that from the act of parliament, which contains no provision to that effect. And, under these circumstances, it appears to me that he might naturally expect that he was to purchase an absolute, and not a redeemable, annuity. I am of opinion that, in the present case, it was incumbent on the auctioneer, who offered the annuity for sale, to describe it as a redeemable annuity. There must therefore be judgment for the plaintiff.

BAYLEY, J. I am of the same opinion. If this had been a common annuity, it might naturally have been supposed that a purchaser would make inquiries as to its nature; but, here, it was granted under the provisions of an act of parliament, and the purchaser, by looking at the act, might reasonably expect to find the nature of the annuity. Now, by the 8th section of the act, he would learn that the company were at liberty to grant any annuity, for any term of years, or for the life of the grantee, or his nominee: and that, in the 9th section, a form of grant is given. Now, both these clauses being silent as to the annuity being redeemable, he would be fully warranted in concluding either: that the annuity on sale was for a term of years or for a life, and he could not have any idea that it was a redeemable annuity. I think, therefore, the plaintiff is entitled to recover back the deposit.

HOLROD, J. Under the provisions of this act, a purchaser would naturally expect that this annuity was not redeemable. I, therefore, concur in thinking that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

* Best, J., absent in the Ball Court.

KIPLING v. TURNER.—p. 261.

The condition of a bond, after reciting that A., B. and C., had filed a bill in equity against D. and E., was, that the obligor would pay all such costs as the Court of Chancery should award to the defendants, on the hearing of the cause: Held, by three Judges, (Abbott, C. J., dubitante,) that the death of E., before any costs awarded, could not be pleaded in discharge of the bond.

DEBT on bond. The defendant cravedoyer of the condition, which was as follows: Whereas, G. N., I. T., and I. T. N., have lately filed their bill of complaint in chancery, against R. M. and I. S., defendants,

touching the matters therein contained. Now the condition of this obligation is such, that if the above bounden George Turner, his heirs, &c., do, and shall well and truly pay, or cause to be paid, all such costs as the said Court shall think fit to award *to the defendants* on the hearing of the said cause, or otherwise, then this obligation to be void, &c. And he then pleaded, firstly, that the said Court, in the said condition mentioned, had not awarded any costs to the said defendants, R. M. and I. S.; and secondly, that after the execution of the bond, and before the said Court had awarded any costs to the said R. M. and I. S., to wit, on, &c. at, &c. the said I. S. died. Replication to the first plea, that after the death of I. S., by the custom and the practice of the said Court, he, the said R. M. was entitled to certain costs. And, that after the death of I. S., by a certain order of the said Court, made in the said cause, it was ordered, that the plaintiffs should pay to the said R. M. his costs, to be taxed, &c., and that the costs were afterwards taxed at 38*l.*, and that defendant had not, though requested so to do, paid the same. And as to the second plea, demurrer. The defendant also demurred to the replication to the first plea.

J. Williams, for the plaintiff. The question here is, whether the bond be discharged by the death of one of the parties, who were defendants in the original suit in chancery. These conditions are to be construed liberally, and every reasonable intendment must be made to effectuate the object of the parties. That object in this case was clearly, to indemnify the plaintiffs in the suit in equity against any costs they might incur therein. There is not anything in the condition which at all refers to the death of one of the defendants in equity, as an event in which the bond is to be at an end. The condition is to indemnify against any costs, if they accrue. In *Com. Dig. Tit. Condition, L. 1*, it is laid down, that if a condition be to enfeoff two before such a day, and one dies, the party ought to enfeoff the other.

Littledale, contra. This is the case of a surety, and the condition is, that he will pay all such costs as shall be awarded to R. M. and I. S., and in such a case, if I. S. dies the bond is discharged. The principle on which cases of this sort depend, is founded on *Lord Arlington v. Merricke*, 2 Saund. 414, a. And *Wright v. Russel*, 3 Wilson, 530, 2 Blackst. 934, *S. C. Barker v. Parker*, 1 T. R. 287, and *Strange v. Lee*, 3 East, 484, are authorities to show, that a bond given for the faithful discharge of a clerk's duties to A. and B., is discharged by either the death of A. or B., or by a change of the firm, by introducing a third person. And the reason given, is, because the surety might have a special reliance on A. or B., which induced him to enter into the obligation. So again, he will not be liable beyond the particular time mentioned in the condition. Here, the death of I. S. may perhaps have been a cause of the costs having been incurred. And there is no averment in the replication, that the costs accruing were such as would have accrued in case I. S. had survived.

ABBOTT, C. J. My mind is not quite satisfied upon this case, because the situation in which defendants in equity stand as to costs, is not the same as at law. For, in equity, the Court sometimes orders the plain-

tiffs to pay costs to one defendant, and to receive them from another, and if that had been done here, this defendant would have received the advantage. I doubt, therefore, whether we can properly introduce the words "or either of them," into the condition of this bond, in order to satisfy the intention of the parties. The inclination of my opinion is, therefore, in favour of the defendant; but, as the rest of the Court are of different opinion, and entertain no doubt upon the subject, the judgment must be for the plaintiff.

BAYLEY, J. This bond is not conditioned to pay such costs as the court of equity shall award to R. M. and I. S. by name, but to pay such costs as shall be awarded by that court to the defendants, and I think, that the meaning of that is, that the present defendant undertakes to pay all such costs as shall be awarded by the Court to those who at that time fill the character of defendants in equity. The case is very different where persons are described by character, and where they are described by name. If, for instance, a man makes A., B. and C., his executors, and directs that A., B. and C., shall sell his property, then if A. dies, B. and C. cannot sell it, but if he directs his executors to sell it, B. and C. may do so. In this case, therefore, I think, that if any costs were awarded to persons filling the character of defendants in equity, they would be within the bond, and here it appears by the replication, that there were costs so awarded. I am therefore of opinion, that there should be judgment for the plaintiff.

HOLROYD, J. I entirely agree in the opinion pronounced by my Brother BAYLEY. It appears, that here, there were three persons filling the character of plaintiffs, and two, that of defendants in equity, and the intention appears to me plainly to have been, that whatever costs the plaintiffs in equity were compelled to pay, should be repaid by this defendant. I think, therefore, that the plaintiff is entitled to our judgment.

BEST, J. The object of the Court is to ascertain the intention of the parties, which it is not very easy in this case to do. I think, however, that it was this. The defendant undertook, that if the persons mentioned in the condition would file a bill in equity, he would be responsible for all the costs which might be awarded against them by the Court. I agree, therefore, that in this case, the plaintiff ought to recover.

Judgment for the plaintiff.*

* See *Barclay v. Lucas*, 1 Term. Rep. 291. (note a.) where the security was given to the banking house, and not to the partners by name, and there the security was held to be liable, notwithstanding a change of the firm.

LEWIS and Others, v. OVENS.—p. 265.

Where a plaintiff in error resides out of the jurisdiction of the Court, he may be compelled to give security for costs: and, in default thereof, the defendant in error will be permitted to proceed on his judgment, notwithstanding the writ of error.

Campbell had obtained a rule to show cause why the defendant, who had sued out a writ of error in this case, should not give security for costs, or why the plaintiffs should not be at liberty to proceed on the judgment, notwithstanding the writ of error. It appeared that the defendant resided in Ireland, and that the writ of error was brought after a sham plea, and judgment upon demurrer to the replication.

Marryat and *Chitty* showed cause, and contended, that this was distinguishable from the cases in which the Court requires security for costs, where a plaintiff resides out of the jurisdiction of the Court. Here, if the security be not given, the party will be liable to be taken in execution. In other cases, the proceedings are only stayed in the mean time.

Campbell, contra, stopped.

ABBOTT, C. J. This is quite analogous to the cases referred to, and it is even a more favourable case for such an application. The present rule, if made absolute, will not stop the party from proceeding in his writ of error, if he has any substantial ground for it. But unless he gives security for costs, the other side may, in the mean time, proceed on their judgment.

Rule absolute.

In the Matter of SALISBURY.—p. 266.

A tipstaff is entitled to take a fee of six shillings, and no more, for conducting a prisoner from the Judge's chambers to the King's Bench.

SALISBURY in person had obtained a rule nisi for one of the tipstiffs of the Court to answer the matters of his affidavit. The affidavit stated, that the tipstaff had taken a fee of half a guinea for conveying him from the judge's chambers (to which he had been brought by habeas corpus) to the King's Bench prison, such fee being more than he had a right to demand, according to the table of fees affixed in the King's Bench, in pursuance of a rule of this Court.

Gurney and *Platt* showed cause upon affidavits, stating, that the fee had been taken for a very long period of time by all tipstiffs in both courts, and that it was allowed by the master in costs.

The Court, however, adverting to the statutes 2 G. 2, c. 22, s. 4, and 32 G. 2, c. 28, s. 5, and the rule of court of Michaelmas term, 3 G. 2, and the table of fees settled in the following year, said, that it was clear, that the tipstaff had no right to take any other fee for taking a prisoner from the judge's chambers to the King's Bench prison, than six shillings, which was the fee allowed him in that table. They, therefore, ordered the fee so taken to be returned to the complainant.*

* See the table of fees in the rules of the King's Bench, p. 241.

BURTON, CHILDREN and BURTON v. ISSITT.—p. 267.

By a deed of dissolution of partnership, a power was reserved to the remaining partners, to use the name of the retiring partner in the prosecution of all suits. In an action in which judgment had been obtained by all the partners, before the dissolution, it was held that the remaining partners had authority, under that power, to give to the defendant a note for the payment of the sixpences, under the Lord's act, on behalf of themselves and the retiring partner.

A RULE nisi had been obtained for discharging the defendant out of custody, on the ground of a defect in the note delivered to him, for the payment of the sixpences under the Lord's act. The action was brought by the three plaintiffs. Children, however, had ceased to be a partner before the note was given, which was in this form, "J. Burton, for self and partners."

Jeremy, now showed cause upon an affidavit, stating, that all the plaintiffs were in partnership at the time when judgment was recovered, and that, by the deed of dissolution of partnership, power was given to the remaining partners, to use the name of Children in the prosecution of all suits brought or to be brought for recovery of partnership property, and contended that, under that power, Burton was authorized to sign the note in this case.

Platt, contra, contended, that although the deed empowered the remaining partners to use the retiring partner's name as a plaintiff in a suit, it did not authorize them to bind him by a promissory note or other negotiable instrument, and that, unless the instrument in question was obligatory on all the plaintiffs as a promissory note, the defendant was entitled to his discharge.

Per Curiam. This was using the retiring partner's name in the prosecution of a suit, and the note is obligatory upon him. The rule therefore, must be discharged.

Rule discharged.

BLUNDELL v. CATTERALL.—p. 268.

The public have no common law-right of bathing in the sea: and as incident thereto, of crossing the sea-shore on foot, or with bathing machines, for that purpose.

TRESPASS, for breaking and entering the plaintiff's close, (describing it, first, as a close called the Sea Shore, within the manor of Great Crosby; second, as a close between the high-water mark and the low-water mark of the river Mersey, in Great Crosby, in the county of Lancaster;) and with feet in walking, and with the feet of horses, and with the wheels of bathing machines, carts, and other carriages, passing over, tearing up, damaging the sand, gravel, and soil of the said close. The defendant pleaded, as to the trespasses committed on the close called the Sea Shore, and on that between the high and low-water mark, a

public right of way on foot, and with cattle, carts, and carriages; and, secondly, as to the same trespasses, that all the liege subjects of our lord the king, had been used and accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy the right and liberty of bathing in the sea, from time to time, being over and upon the whole or any part of, or adjoining to, the said close, in which, &c., at all seasonable and convenient times, for their health and recreation, and for that purpose, of going and returning, passing and repassing, into, through, over, and along the said close, in which, &c., on foot, and with their servants, and with carriages and bathing machines, and horses drawing the same to the sea and back again; and of staying in and upon the close a necessary and convenient time for the purposes of bathing as aforesaid: And, thirdly, as to part of those trespasses, a right of bathing and of passing on foot only. The plaintiff took issue on these pleas; and also newly assigned that the defendant committed the trespasses on other occasions, and for other purposes than those in the pleas mentioned, and out of the highway in the first set of pleas mentioned. Issue thereon. At the trial, at the last Lancaster assizes, before BAYLEY, J., a verdict was found for the defendant on the first set of pleas; and for the plaintiff on the new assignment, and on all the other pleas, subject to the opinion of the Court on a special case. The plaintiff was the lord of the manor of Great Crosby, which is bounded on the west by the river Mersey, an arm of the sea. As lord of the manor, he was the owner of the shore, and had the exclusive right of fishing thereon with stake-nets. The defendant was the servant at a hotel, erected in 1815, upon land in Great Crosby, fronting the shore, and bounded by the high-water mark of the river Mersey, the proprietors of which kept bathing machines for the use of persons resorting thither, who were driven by the defendant in machines, across the shore into the sea, for the purpose of bathing, and the defendant received a sum of money from the individuals so bathing, for the use of the machines, and for his service and assistance. No bathing machines were ever used upon the shore in Great Crosby, before the establishment of this hotel, but it had been the custom for the public to cross it on foot, for the purpose of bathing. There was a common highway for carriages along the shore, and it was proved, that various articles for market were occasionally carted across the shore, although the more common mode of conveyance for such things was by a canal made about forty years ago. The defendant contended for a common-law right for all the king's subjects to bathe on the sea-shore, and to pass over it for that purpose, on foot, and with horses and carriages. The case was argued in last Easter term.

Gregson, for the plaintiff, contended, that there was no common law right to bathe, independently of usage in the particular place; first, from the silence of the authorities; secondly, because such a right was contrary to analogies; and thirdly, because it was contrary to established and acknowledged rights. As to the first point, it is sufficient to refer to Lord Hale's treatise *De Jure Maris* and *De Portibus Maris*, where,

in chapters 5 and 6, he enumerates the different public and private rights applicable to the sea-shore, and creeks and arms of the sea, and does not include this right. As to the second, it is laid down in Lord Hale, *De Portibus Maris*, pp. 73 and 76, and in *Morgan's case*, p. 51 of the same book, that the public have no right to unlade goods, or to moor or tow their vessels on the shore, without leave. The authority of Bracton, lib. i. c. 12, s. 6, cannot have much weight, for it is only copied from the civil law, and was overruled in *Ball v. Herbert*, 3 T. R. 261. As to the third point, it is clear that such a right would interfere with the improvement of the shore by the lord; and that this right is in the lord appears from Sir Henry Constable's case, 5 Rep. 107, *Hammond v. Digges*, Dyer, 326, *The Attorney-General v. Roll and Others*, cited Hale, p. 27, *Stockwell v. Terry*, 1 Ves. sen. 115, and *Warwick v. Collins*, 2 M. & S. 361.* So, all wharfs, quays, &c., erected on the shore, might be pulled down; for no length of time can legalize a nuisance, which these would be, if this right existed. *Vooght v. Winch*, 2 Barn. & Ald. 662, *Rex v. Cross*, 3 Campb. 224.

Joy, contra. The case of *Ball v. Herbert* is very distinguishable from the present. That case only applied to the banks of a navigable river, which stand obviously on a different foundation from the sea-shore. On the banks of the river, where the right of towing was claimed, no general right of highway was contended for; whereas, in the present case, the locus in quo is a public highway. The claim there made, if maintainable, would have established the right to tow on both sides of all navigable rivers, although this is contrary to general practice, and although most of the navigable rivers in the kingdom have been made so under different acts of parliament, passed subsequently to the lawful construction of dwelling-houses, &c., upon their banks. Whereas the barren sands of the sea-shore, covered by the sea every tide, are nowhere so appropriated. The fact, too, that such acts have been repeatedly passed to make rivers navigable, and to appoint towing-paths on their banks, within certain limits, shows that such paths did not previously exist at common law. An act of parliament was not considered necessary to render the open sea navigable, or its shores accessible. The distinction between navigable rivers and the sea-shore is frequently noticed by Lord Hale, pp. 6 and 7. This right is not contrary to analogies; for the public, generally speaking, have a right to fish on the coast, and on arms of the sea, and to cross its shores for that purpose, although that right may, in some few instances, have been interfered with, where individuals claim under a grant from the crown, or by prescription, which presupposes a grant. Lord Hale, pp. 11, 19, 20, and *Bagott v. Orr*, 2 Bos. & Pull, 472. The right to bathe in the sea is of great moment to the public, and less liable to private appropriation than the right of hery. Although private individuals may possess advantages connected with the shore, still they cannot possess any which can authorize them to preclude the public from their permanent right of free passage over it. The erection

* The references are to Lord Hale's treatises, as published by Mr. Hargrave in his *Law Tracts*.

of wears, although in some instances tolerated under ancient grants, has been repeatedly treated and considered by the law as a nuisance, on the ground that they interfere with the public rights of fishery. In *Weld v. Hornby*, 7 East, 195, the substitution of a stone wear for one of brushwood, was held to be an illegal encroachment, because it prevented the ascent of fish up the river. In *Bagott v. Orr*, the right of the public to pass freely over the sea-shore for any common use and enjoyment thereof, is fully recognised. The authority of Bracton is expressly in point, and fully establishes the position, that the sea-shore is as common to all as the sea itself; and as the sea is open to every one, it follows, that if the passage from Bracton be good law, that the shore is equally so. His authority, indeed, was questioned in *Ball v. Herbert*. Lord Hale, however, in his History of the Common Law, mentions Bracton as a good authority. He was Chief Justice of England in the reign of Hen. 3, and from his station, therefore, must be taken to be no mean authority of what the common law was in his day. The passage referred to, is cited by Lord Hale in his treatise, *De Portibus Maris*, c. 7, p. 83, and also in *Callis on Sewers*, p. 54. It is no objection to the passage, that Bracton has availed himself of the very words of Justinian. It was impossible, that he should not have found the principles there laid down in the civil law, or in any other well digested code, for they are directly derived from the law of nature, and are indispensable to the enjoyment of those common benefits which are most susceptible of private appropriation, and as such, are to be found in the written or unwritten law of all civilized nations, *Grotius De Jure Belli et Pacis*, c. 2, ss. 3 & 4, and *Mare liberum*, passim. Lord Hale, c. 6, p. 78, is an authority to show a general right in the public to the free use of the shore for all lawful purposes. As to the third objection, that the right claimed in this case, is incompatible with acknowledged private rights, such as the erecting of wharfs, quays, and embankments, the right now claimed being the more ancient, the more general, and the more important of the two, is paramount. Besides, this general freedom of passage over the shore is not incompatible with the occasional construction of quays or wharfs. They are rarely, in point of fact, so situated as to offer any real obstruction to persons crossing the shore for a lawful purpose, while they mainly contribute to another very material and equally lawful enjoyment of it, in the facilities afforded by them to the landing and loading of goods, and such buildings are allowed from the necessity of the case, and for the public good, and are in no instance so entirely *juris privati* as not to be subject to public regulation, being affected with a public interest. And if they should be so situated, as instead of conducing to the better use of the shore, to become actual obstructions thereto, they must be abated as nuisances, Lord Hale, c. 7, *De Portibus Maris*, p. 85. Besides any argument derived from the difficulty of reconciling the erection of wharfs or embankments, with the general right to pass over the shore, for the purpose of bathing, must apply equally against the right to pass over it for the purpose of fishing, which latter is admitted to exist. It is clear, that the common law right to bathe exists, from the universal practice of the whole realm, which is a proof of what the common

law is, the usage of a place being a custom, but that of the whole realm being the common law. The authority of Bracton is expressly in point, and establishes the position, that the sea-shore is as common to all as the sea itself. If so, then the absence of any authorities, shows that it remains the common law now; for it cannot be shown to have been since altered. The right to the shore was originally in the king, and when in his hands, was subject to this right. No subject claiming under him, can claim a greater right than the king had. As to the right to bathe from machines, it exists as an accessory to the general right, for many persons, from infirmity or other circumstances, might otherwise be deprived of this beneficial practice.

Cur. adv. vult.

And now, there being a difference of opinion, the Court delivered their judgments *seriatim*.

BEST, J. The question in this case is, whether there be a common-law right to pass over the shore for the purpose of bathing in the sea. It will not be disputed that the sea, which has been called the "great highway of the world," is common to all. Bathing in the sea, if done with decency, is not only lawful, but proper, and often necessary for many of the inhabitants of this country. There must be the same right to cross the shore in order to bathe, as for any other lawful purpose. We are, therefore, now to decide, whether the public are precluded from passing, except at particular places, over the beach to the sea without the consent of some lord of a manor. That this will be the consequence of our deciding in favour of the plaintiff, has been already admitted at the bar, and must be conceded by every one. I am fearful of the consequences of such a decision; and, much as I dislike differing from the rest of the Court, I have thought it my duty to declare that I cannot assent to it. We have been told that lords of manors will find it their interest to indulge the public with the privilege of going on or over the sands of the sea, and that judges and juries will check the vexatious exercise of the right to exclude them. But the free access to the sea is a privilege too important to Englishmen, to be left dependant on the interest or caprice of any description of persons.

It is agreed by all, that the sea-shore was at first appropriated to the king, from whom the right to it must be derived. The present state of the shore shows the manner in which the crown must have used it. Some parts of it were held exclusively by the crown for the purposes of fisheries, harbours, warehouses, &c. But the greatest part was left open as a common highway between the sea and the land. This is the state in which it continues to this day, and in which, from its general sterility, it must ever continue. From the state of the greatest part, has arisen the general rule, or common-law right, and the state of the portions exclusively occupied has occasioned the exceptions. The claim of the public to a right of way over the beach stands on the general law, and a person who will dispute this public right in any particular part of it, must establish his right to do so by showing, first, that the king had an exclusive possession of such part, and that a right to such exclusive possession has been conveyed from the crown to such person. This has been the course in which persons have proceeded

who have attempted to show any exclusive right, either in arms of the sea or in the shore. In Lord Fitzwalter's case, 1 Mod. 105, Lord HALE says, "An arm of the sea is prima facie common to all, and if any will appropriate a privilege to himself, the proof lieth on his side; for in case of an action of trespass brought for fishing there, it is prima facie a good justification to say, that the *locus in quo* is *bracium maris*, in quo unusquisque subjectus dom. regis habet et habere debet liberum viscariam." So, in *Bagott v. Orr*, 2 Bos. & Pull. 497, the Court of Common Pleas held, "that if the plaintiff had it in his power to abridge the common-law right of the subject to take sea-fish upon the shore within his manor, he should have replied that matter specially." The same doctrine is laid down in *Carter v. Murcot*, 4 Burr. 2162. It may be observed, that in the case now under consideration, it is expressly found, that the soil of the locus in quo is in the plaintiff; but I say the soil must be in the plaintiff, as it was in the king; for the grantee cannot have a greater interest than the grantor had. The king had the right of soil in the shore in general; but the public had a right of way over it, and the king's grantee can only have it, subject to the same right. In the treatise of *De Jure Maris*, p. 22, Lord HALE says, "The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers and arms of the sea are affected for public use." If the owners of the soil must claim by prescription, can they establish an exclusive right? Did they ever possess an exclusive right? For, as Lord HALE says, the civilians tells us truly, "*Nihil præscribitur nisi quod possidetur*," *De Jure Maris*, p. 32. As the king might have granted a right in particular parts of the shore, so, either he or his grantee of the soil of any part of the shore, may take the products of the shore, provided their removal does not impede the public right of way. The owner of the soil of the shore, may also erect such buildings or other things as are necessary for the carrying on of commerce and navigation on any parts of the shore that may be conveniently used for such erections, taking care to impede, as little as possible, the public right of way. This is not more inconsistent with a public right of way over it, than the right of digging a mine under a road, or the erecting of a wharf on a river, are inconsistent with the right of way along such road or river. The former does not interfere with the use of the road; and although the latter, in order to be useful, must be carried out beyond the high-water mark, and, whilst the tide is up, must somewhat narrow the passage of the river; yet, such wharves are necessary for the loading and unloading of vessels, and the right of passage must be accommodated to the right of loading and unloading the craft that pass. The law in these, as in all other cases, limits and balances opposing rights, that they may be so enjoyed as that the exercise of one is not injurious to the other. The civil law, copying, in this respect, from the law of nations, allowed any one to build on the sea-shore (there being, under that law, no lords of manors to claim the soil,) but imposed on the builders the condition that the law of England imposes on the owners of the soil; that is, that their buildings should not interrupt the

right of way. Digest, l. 43, tit. 8: "In littore jure gentium ædificare liceret nisi usus publicus impediret."

The universal practice in England shows the right of way over the sea-shore to be a common-law right. All sorts of persons who resort to the sea, either for business or pleasure, have always been accustomed to pass over the unoccupied parts of the shore with such carriages as were suitable to their respective purposes, and no lord of a manor has ever attempted to interrupt such persons. Goods could not be landed or loaded except at particular places, but this restraint was imposed by laws made for the protection of the revenue, and the security of the realm, and is not the consequence of any rights in the owners of the soil of the shore. Men have landed from boats, drawn their boats on the sands during their stay on shore, and embarked again in their boats. Persons have at all times, at their pleasure, walked or ridden on the sands. Men have, from the earliest times, bathed in the sea; and, unless in places or at seasons when they could not, consistently with decency, be permitted to be naked, no one ever attempted to prevent them. So far from the law allowing lords of manors to restrain persons from bathing, it will give them every facility for this recreation. Bathing promotes health. By bathing, those who live near the sea are taught their first duty, namely, to assist mariners in distress. They acquire, by bathing, confidence amidst the waves, and learn how to seize the proper moment for giving their assistance. It is found as a fact, in this case, that it has been the custom for the public to cross the spot in question on foot for the purpose of bathing. Bathing machines were used before my time, and I believe before that of the oldest person now alive, and I think the use of them is essential to the practice of bathing. Decency must prevent all females, and infirmity many men from bathing, except from a machine. Attempts have been made to make those who use machines pay some acknowledgment to the lord of the manor where they were used: but I cannot find that any of those attempts have yet succeeded. I shall presently show from authority, that the right to fish is only a part of the general right of the subjects of England. Persons have also crossed the beach for the purpose of fishing in the sea, and have brought back their fish over the beach, both on horses and in carriages. These acts of the fishermen are instances in support of the common-law right of way.

The practice of a particular place is called a custom. A general immemorial practice through the realm is the common law. Many of our most valuable common-law rights have no other support than universal practice. In *Bull v. Herbert*, 3 T. R. 261, Lord KENYON says, "Common-law rights are either to be found in the opinions of lawyers, delivered as axioms, or to be collected from the universal and immemorial usage throughout the country." The instances put by me, sufficiently demonstrate the existence of a universal custom in favour of a public right of way over the sea-shore.

It has been at all times the policy of this country to encourage navigation. The free passage of the sea-shore is essential to the convenience and safety of navigation. Cases of immediate necessity or im-

minent danger may be said to form exceptions to general rules; but there are many cases in which there is neither immediate necessity nor imminent danger, in which boats must pass between ships at sea and the shore, letters and provisions must be sent, passengers require to land or to embark, intelligence necessary to the further prosecution of a voyage is desired, or a pilot is wanted. For many leagues of coast, there is no public passage marked out, by which persons may go to or from the sea. But fixed places will not do. Winds or currents make it necessary, that the greatest part of the shore should be left open for persons to land on, and embark from. There is no statute, or rule of common law, that secures the right of passage over the shore for purposes connected with navigation; those who have passed over the shore for those purposes, have been trespassers, if they were not justified under the general common-law right of free passage. Is it to be supposed, that in a country, the prosperity and independence of which depends on navigation, that which is so necessary to navigation as a road for all lawful purposes to the sea, should not have been secured to the public, particularly when it might be done without injury to the interest of any individual?

There is no clear and express declaration on this point, either in the statutes or in the common law. But this right is so important to the best interests of the country, that had not the constant exercise of it been considered sufficient to establish it, the legislature would no doubt have declared it to be in the people of England. Bracton, lib. 1, cap. 12, sec. 6., says, "*Publica vero sunt omnia flumina et portus. Ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est de jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis reponere, cuius, liberum est, sicut per ipsum fluvium navigare: sed proprietas earum illorum est quorum prediis adherent, et eadem de causâ arbores in eisdem natæ eorundem sunt: et hæc intelligenda sunt de fluminibus, perennibus, quâ temporalia possunt, esse privata.*" This passage proves all that I am attempting to establish. It shows that all persons have a common right on rivers; that the right of fishing exists only as a part of that common right, and that the banks of rivers are as much open to the use of the public as the rivers themselves. The passage has been supposed to prove too much, and therefore it has been said that its authority cannot be relied on. Mr. Justice BULLER, speaking of it in *Ball v. Herbert*, 3 T. R. 263, says, "that it plainly appears to have been taken from Justinian, and is only part of the civil law; and whether or not it has been adopted by the common law, is to be seen by looking into our books; and there it is not to be found." I admit that Bracton agrees with the civil law, and I must add, with the law of all civilized nations. Selden, who wrote his "*Mare clausum*," to prove that an exclusive right might be acquired in parts of the sea, admits that the sea was originally common to all, and in lib. 1, cap. 2, he has collected from the works of the learned of all nations, as well philosophers, divines and poets, as lawyers, that the sea and its shores were common to all men, as much so as the air that blows over them. This

I think proves, that the doctrine is reasonable, and ought to be adopted into our law, unless there be something in our particular situation to exclude it; and, so far from it being the case, there never was a country, the local situation of which, and the habits and interests of the inhabitants of which, so much required such a law.

But our books show, that this passage has been adopted into our law. Mr. Justice BULLER tells us, that Callis quotes it as English law, and I have often heard Lord Kenyon speak with great respect of that writer. Bracton has not stated this as civil law, he has made it part of his book, *De legibus et consuetudinibus Angliæ*. He was Chief Justice of England in the reign of Henry the Third; and Lord Hale (*Hist. of the Common Law*, ch. 7) says, that in his time the common law was much improved, and the pleadings were more perfect and orderly than in any preceding period of our history. Surely such a man is no mean authority for what the common law was at the time he wrote. In Fortescue, p. 408, Lord Chief Justice PARKER says, "As to the authority of Bracton, to be sure many things are now altered, but there is no colour to say, that it was not law at that time, for there are many things that have never been altered, and are law now." As law is a just rule fitted to the existing state of things, it must alter as the state of things to which it relates alters. I do not say, that the whole of the passage in Bracton is now good law: it was all good law at the time he wrote, and all of it that is adapted to the present state of things is good law now. It is objected, that Bracton says, "that any one may, in any river, fasten vessels with ropes to the trees on the banks, and unload the cargoes on the banks." Undoubtedly the public cannot now pretend to claim this right, in all navigable rivers. Many rivers have been rendered navigable since Bracton wrote, which in his time were private streams. The public have no greater right on the banks of such rivers, than the owners of the adjoining lands granted them when such rivers were made, from private streams, public rivers; and the extent of the grant must be ascertained from usage. This is the case with a new-made road. If one dedicate to the public a right of way over his lands, the public must take the road with gates on such parts of it as the owner thinks proper to erect at the time he makes the dedication. But Bracton speaks not of newly made rivers, but of such as were always navigable, and the banks of which had been as open to the public as their waters. This I take to be the law with all inland navigations in the reign of Henry the Third. These, like the sea and its shores, were then the property of the public, and the right of the public in them was not acquired by any compromise with the interest of any individual. On some rivers that have been navigable from time immemorial, the public using but one of the banks for a towing path, the other has been usefully occupied by the owner of the adjoining land, and so an exclusive right has been established to the part so occupied. But the barrenness of the greatest part of the sea-shore has prevented it from becoming the subject of exclusive property. It is useful only as a boundary and an approach to the sea; and therefore, ever has been, and ever should continue common to all who have occasion to resort to the sea. Thus,

the case of *Ball v. Herbert* is distinguished from the present, and it must be recollected, that, in that case, Lord KENYON said, "Some of the passages in Lord Hale, which seemed to favour the common-law right, are rather applicable to banks of the sea, and to ports; and it is part of the king's prerogative to create ports, which was lately exercised at Liverpool." In Brooke's Abridgment, tit. *Customs*, pl. 46. all the Judges agreed, "that fisherinen may justify going on the land adjoining the sea, to fish in the sea; for this is for the good of the commonwealth, affording sustenance to many persons, and is the common law." If the right of fishing is only a part of that more general right for which I am contending, as appears from the passage in Bracton, and will appear from Lord Hale, then this is a decision in support of the general right.

The reason on which my judgment is grounded is public advantage. The right of bathing in the sea, which is essential to the health of so many persons, is as beneficial to the public as that of fishing, and must have been as well secured to the subjects of this country by the common law. That the right of using the shore for the purpose of fishing does not depend on any particular law applicable to fishing only, but is part of the more general right of the subjects to the sea and its shores, is proved by Lord Hale, putting the practice of fishing as evidence of the general right. In part 1, cap. 8, *De Jure Maris*, p. 11, he says, "The king's right of propriety, or ownership, in the sea, and soil thereof, is evidenced principally in these things that follow: first, the right of fishing in the sea, and creeks, and arms thereof, is originally lodged in the crown." This makes the judgment in Brooke, bear directly on the point in dispute. Lord Hale, in his treatise *De Portibus Maris*, (cap. 6, p. 73,) says, "Before any port is legally settled, although the propriety of the soil of a creek or harbour may belong to a subject or private person, yet the king hath his *jus regium* in that creek or harbour; and there is also a common liberty for any one to come thither with boats and vessels, as against all but the king. And, upon this account, though A. may have the propriety of a creek or harbour, or navigable river, yet the king may grant there the liberty of a port to B.; and so the interest of propriety and the interest of franchise several and divided. And in this no injury is at all done to A.: for he hath what he had before, viz., the interest of the soil, and consequently the improvement of the shore, and the liberty of fishing; and as the creek was free for any to pass in it, against all but the king, (for it was *publici juris*, as to that matter before,) so now the king takes off that restraint, and by his license and charter, makes it free for all to come and unload. Here, we have the distinct authority of Lord Hale, that although a man has the soil under an arm of the sea, and the soil of the shore, yet the public have not only a right to navigate on the waters, but to *unload* on the shore; and that this right can only be restrained by the king's prerogative. If they have a right to unload, they must have the right to come over the shore; for the right to unload would otherwise be useless. The right on the shore is declared by this passage to be as common to the public as the right on the water; that the water is open to the public for all lawful purposes is not de-

nied. What law, then, has narrowed the right of the public on the shore? Lord Hale then adds, "But if A. hath the ripa or bank of the port, the king may not grant a liberty to unlade on that bank or ripa without his consent, unless custom hath made the liberty thereof free to all, as in many places it is; for that would be a prejudice to the private interest of A., which may not be taken from him without such consent. And, therefore, in the creation of a new port, either by proclamation or charter, it hath been the course to secure the interest in the shore beforehand, for the building of wharves and keys, for the application of the merchandise, and for the building of houses of receipt." Lord Hale makes the distinction between the shore of the sea and the banks of a river, which Lord Kenyon points at in *Bull v. Herbert*; the former is free for all to come and unload, but the king cannot grant a liberty to unload in the latter, without the consent of the owner. I again repeat, that the shore is not free to unload from any particular law giving this freedom, but from the general right of passage over it, which the usage of the whole coast shows to have been reserved for the benefit of the public out of the grant of the soil by the crown. This is further proved to be the meaning of Lord Hale by the concluding words of this passage, in which he says it was usual to secure the interest of the shore, not for a way to the sea, but for the building wharves, quays, and houses for the reception of goods. The right of way the public had, but the right of building was to be purchased. The cases of *Young v. —*, Lord Raym. 725, and *The Queen v. The Inhabitants of Cluworth*, 6 Mod. 163, are properly overruled by that of *Bull v. Herbert*; and I do not rely on those cases.

My opinion is founded on these grounds. The shore of the sea is admitted to have been at one time the property of the king. From the general nature of this property, it could never be used for exclusive occupation. It was holden by the king, like the sea and the highways, for all his subjects. The soil could only be transferred, subject to this public trust; and general usage shows that the public right has been excepted out of the grant of the soil. Our law books furnish us with little for our guidance on this subject; what is to be found seems to favour the common-law right of way. But unless I felt myself bound by an authority as strong and clear as an act of parliament, I would hold on principles of public policy, I might say public necessity, that the interruption of free access to the sea is a public nuisance. In the first ages of all countries, not only the sea and its shores, but all perennial rivers, were left open to the public use. In all countries, it has been matter of just complaint, that individuals have encroached on the rights of the people. In England, our ancestors put the public rights in rivers under the safeguard of magna charta. The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours. It has been said, that

lords of manors should have a right to prevent bathing, that they might hinder persons from doing it in places of public resort. Magistrates are armed with authority to bring to punishment such as bathe indecently. I would rather rely on disinterested and responsible magistrates, than on an interested and irresponsible lord of a manor. A lord of a manor might remove bathers from a part within view of his own house, but would he be equally active to protect his neighbours from offence? If he is not, I know no mode of forcing him to execute the power he derives from his property. For these reasons, I am of opinion that the defendant is entitled to the judgment of the Court.

HOLROYD, J. The question put in this case for our opinion, is the general question, whether there is a common-law right for all the king's subjects to bathe in the sea, and to pass over the sea-shore for that purpose, on foot, and with horses and carriages. But, coupled with the facts stated in the case, the question really is, whether there is a common-law right in all the king's subjects to do so in the locus in quo, though the soil of the sea-shore, and an exclusive right of fishing there in a particular manner, (namely, with stake-nets,) are private property belonging to a subject, and though the same have been a special peculiar property from time immemorial. The plaintiff being stated to be the owner of the soil of the shore, and to have the exclusive right of fishing thereon, with stake-nets, as lord of the manor, the soil, as parcel of or belonging to the manor, must, according to 2 Bl. Com. 92, have been so from before the time of passing the statute, *Quia Emptores Terrarum*, tempore Edw. 1, since which time no manor can have been created; and the plaintiff being stated to have the exclusive right of fishing, as lord of the manor, this can only be as appendant or appurtenant to the manor. It must, therefore, be by prescription, and consequently there has been an exclusive right of fishing there from time immemorial. The question, too, is as to the public right to the extent above stated, independently of usage and custom. The right is claimed on the pleadings, as founded not on usage or custom, but upon the supposed general law only; and the usage, as stated in the special case, is found to have been for the public to cross the sea-shore on foot only, for the purpose of bathing, no bathing machines having ever been used in Great Crosby, where the locus in quo is situate, before the establishment of the present hotel. My opinion, therefore, on this case, will not affect any right that has been or can be gained by prescription or custom, either by individuals or by either the permanent or temporary inhabitants of any vill, parish, or district.

The claim upon the pleadings, respecting the public highway along the shore, and the verdict, and facts found in the special case respecting the same, make no difference, but leave the question, with respect to the right of bathing, and the right incident thereto (if any) of passing over the sea-shore for that purpose, on foot and with horses and carriages, the same as if no such claim of a general public highway existed, or was put upon the record, as the jury have found a verdict for the plaintiff upon the new assignment, that the trespasses complained

of were committed in the locus in quo on other occasions, and for other purposes than as a general public highway and out of the highway there.

It was contended in argument at the bar, that by the common law of England, all the king's subjects had a right, not only to traverse the ocean itself in every direction, as well for commerce, trade, and intercourse, as for every other lawful purpose; but, also, that they had a general public right of way over the sea-shore to and from the sea, and that they had it, as well during the recess as during the flux of the tide, for all lawful purposes; and that the king could not grant the shore so as to supercede or to deprive the public of the exercise of that right over the sea-shore. And it was further contended, that even if the public right was not so extensive, yet that, at all events, the king's subjects had a right of bathing on the sea-shore, so that it be exercised in such a way as is conformable to decency; and that they had also, as incident thereto, a right to pass over the sea-shore, not merely on foot, but with horses and carriages; that is to say, with bathing-machines for that purpose, whether the sea-shore belonged to the king as public property, or to any individual as being now or even immemorially private property; and that such public right could not be superceded by the king's grant of the sea-shore as private property. And the earliest authority cited for this purpose was from Bracton, who copied it from the civil law. But whatever may be found to be the civil law upon this subject, and whatever may have been stated by some of our law writers from the civil law, or may be found to have dropped as dicta from some of our judges; yet it appears, I think, that the civil law, as applicable to this subject, differs from the common law of England; that its principles have not only not been adopted into the common law, but are at variance with it, and are therefore no guide to us; that the public right, to the extent claimed in this case, is not only not found to be established by our law, but that the established principles of our law are inconsistent with it. The question is with regard to the shore; that is to say, the land between the high and the low water-mark, and according to Lord HALE's definition of the sea-shore, between those marks of ordinary tides, that is to say, between the ordinary flux and reflux of the sea.

In Bracton, l. 1, c. 12, s. 6, it is thus laid down: "*Publica vero sunt omnia flumina et portus, ideoque jus piscandi omnibus commune est in portu et in fluminibus. Riparum etiam usus publicus est jure gentium, sicut ipsius fluminis. Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis reponere, cuivis liberum est, sicut per ipsum fluvium navigare; sed proprietas earum, illorum est, quorum prædiis adhærent et eâdem de causâ, arbores in eisdem natæ eorundem sunt. Sed hæc intelligenda sunt, de fluminibus perennibus; quia temporalia possunt esse privata.*" This passage is quite general, and is not confined to tide or navigable rivers. The doctrine as to the banks of rivers, is contrary to the case of *Ball v. Herbert*, 3 T. R. 261, respecting the rights of towing-paths, where Lord KENYON says, "That there is such a custom on most of the navigable rivers no

person doubts, but still the right was founded solely on the custom." And there the Court determined against the general common-law right claimed. It is, indeed, supported by the dicta of Lord Holt, in *Young v. —*, 3 T. R. 261, and *Rex v. Cluworth*, 1 Ld. Raym. 725; 6 Mod. 163, in the former of which cases he ruled, "that every man, of common right, may justify the going of his servants or his horses upon the banks of navigable rivers, for towing barges, to whomsoever the right of the soil belongs:" and in the latter, "that if one has land adjoining on a common river, every one that uses that river, has if occasion be, a right to a way by a brink of water over that land, or further in if necessary." But both these authorities were cited and commented on in the case of *Bull v. Herbert*, and expressly overruled by the Court. The passage in Bracton is taken from Justinian, Inst. lib. 2, tit. 1, ss. 2, and 4, and is in his very words, except with the addition of the last sentence. But besides the difference between our law and the civil law, in regard to what is even there laid down by Bracton, the variance between the common law and the civil law in other respects, as to marine properties and rights, shows, that the civil law cannot be any guide, or afford any illustration to us in these matters; and therefore, though Justinian in s. 1, of that book and title, says, "Nemo igitur ad littus maris accedere prohibetur;" yet his doctrine cannot have any weight or authority in that respect with us, unless it be found to be confirmed or adopted by our own lawyers, and particularly, if it be found not to be consistent with, and conformable to the doctrines and principles of the common law. That there is this great difference between the civil and the common law, will appear from stating what is laid down in Justinian, in some of the other sections of that book and title, in comparing it with what is undoubtedly the common law, as to that species of property. In Justinian, the shore is thus defined, "Est autem littus maris quatenus hybernus fluctus maximus excurrit." By the common law, we know it is confined to the flux and reflux of the sea at ordinary tides. In Justinian, this is laid down, De usu et proprietate littorum, s. 5. "Littorum quoque usus publicus est et juris gentium, sicut et ipsius maris; et ob id cuilibet liberum est casam ibi ponere in quam se recipiat, sicut reti asiccare et ex mari deducere: Proprietas autem eorum potest intelligi nullius esse, sed ejusdem juris esse, cujus et mare, et quæ subjacet mari terra vel arena." By the common law, no such right exists in the public of erecting on the sea-shore any building for drying their nets; and instead of the property in the shore being in no one, it is prima facie in the king, and may be in a subject; and so may even an arm of the sea, a districtus maris, as Hale De Jure Maris, p. 31, says, "a place in the sea between such points, or a particular part contiguous to the shore, or a port, or creek, or arm of the sea; though, as he also there lays it down, in the main sea itself, adjacent to his dominions, the king only hath the property, but a subject hath not, and indeed cannot have that property in the sea through the whole tract of it, that the king hath, because, without a regular power, he cannot possibly possess it." So by the civil law, s. 18, "Lapilli et gemmæ et cetera quæ in littore maris inveniuntur

jure naturali statim inventoris fiunt." By our law, we know that wrecks and things found upon the sea-shore, do not belong to the finder, but where the owner cannot be discovered, to the king or his grantee, or to some person by prescription, which presupposes such grant. So by the civil law, s. 22, "*Insula quæ in mari est, quod raro accidit, (here he is speaking of an island newly rising from the sea,) occupantis fit; nullius enim esse creditur.*" Lord HALE, *de Jure Maris*, p. 36, shows how the common law differs from this, "As touching islands arising in the sea, or in the arms, or creeks, or havens thereof, the same rule holds which is before observed, touching acquets, by the reliction or recess of the sea, or such arms, or creeks thereof. Of common right and *prima facie*, it is true, they belong to the crown; but where the interest of such *districtus maris*, or arm of the sea, or creek, or haven, doth, in point of propriety, belong to a subject, either by charter or prescription, the island that happens within the precincts of such private propriety of a subject, will belong to the subject, according to the limits and extents of such propriety."

By the common law, all the king's subjects have in general a right of passage over the sea, with their ships, boats, and other vessels, for the purposes of navigation, commerce, trade, and intercourse, and also in navigable rivers; and they have also, *prima facie*, a common fishery there; but they may be excluded from the latter right, though not now by charter, at least by immemorial custom or prescription. These rights are noticed by Lord HALE but whatever further rights, if any, they may have in the sea, or in navigable rivers, it is a very different question whether they have, or how far they have, independently of necessity or usage, public rights upon the shore, (that is to say, between the high and low water mark,) when it is not sea, or covered with water, and especially when it has from time immemorial been, or has since become private property. For the purpose of the king's subjects getting upon the sea, and upon the navigable rivers, to exercise their unquestionable rights of commerce, intercourse, and fishing, there are not only the ports of the kingdom, established from time to time by the king's prerogative, and called by Lord HALE, the *Ostia Regni*; but also public places for embarking and landing themselves and their goods. It was not by the common law, nor is it by statute, lawful to come with or land or ship customable goods in creeks or havens, or other places out of the ports, unless in cases of danger or necessity, nor fish or land other goods not customable, where the shore or the land adjoining is private property, unless upon the person's own soil, or with the leave of the owner thereof, who, Lord HALE says, may, in such case, take amends for the trespass in unloading upon his ground, though he may not take it as a certain common toll; because, for so doing, it appears in Lord HALE's *Treatise De Portibus Maris*, p. 51, that one Morgan was fined 100 marks. No such amends could be taken, if there was a public right of coming there for that purpose in particular, or for purposes in general. In a case of necessity (as Lord HALE, in his *Treatise De Portibus Maris*, p. 53, says,) either of stress of weather, assault, or pirates, or want of provisions, any ship might put into any creek or haven. And he then further says, "In

case of necessity, and for the supply of fishermen, all places were to that purpose and end ports:" that is, for the purpose of finding provisions for ships and mariners. This is not consistent with the general right contended for, as being in the public, of coming on the shore for their purposes in general as and when they please. It is said, indeed, in Fitzh. Barre, 93, which cites 8 Ed. 4, 19, "Nota by DANBY, *et Puisne Judge of C. P.* That the fishers who fish in the sea may justify their going upon the land adjoining to the sea, because such fishery is for the commonwealth, and for the sustenance of all the kingdom; wherefore this is the common law, which was granted, &c." But in Bro. Abr. Customs, 46, the same case is more fully stated, where the doctrine appears to have been laid down on a question which arose upon a custom. That was trespass for digging land; and the defendant pleaded, that it was four acres adjoining to the sea, and that all the men of Kent, from time immemorial, have used, when they have fished in the sea, to dig in the land adjoining and pitch stakes for hanging their nets to dry. *Nele, Counsel.* He ought to show what men. *CHOKE, C. J. of C. P., and LITTLETON, J. of C. P.* This is not the custom, for it is against common right and reason. *DANBY, J. of C. P.* Fishers may justify going upon the land to fish, for this is commonwealth, and for the sustenance of man, and is the common law, which was granted. *Fairfax, Counsel.* "Digging is destruction of the inheritance, therefore it is not a custom, &c." But this appears more fully still, by recurring to the Year-book itself, and Lord HALE, *De Portibus Maris*, 86, treats it as arising upon a custom; for he there says, "Look at the book of 8 Ed. 4, 18, 19, for the Custom of Kent, for fishermen to dry their nets upon the land, though it be the soil of private men." The case, as stated in the Year-book, 8 Ed. 4, 18, 19, after stating the pleadings as in Broke, proceeds as follows: *Nele* He hath said that the men have used, &c., and this is not a good prescription, being, he ought to show who, &c. *CHOKE.* This custom cannot be good; for it is against common right to prescribe to dig in any land; but there are other customs, which are used throughout the whole land, and such customs are lawful; as of inkeepers, &c., and also a neighbour negligently keeping his fire, &c., and such customs are good, &c. *LITTLETON.* A custom which runs through the whole land is the common law, as the cases that you have put are, &c.; and, Sir, such customs, which may stand with reason, shall be suffered, as in the case where the younger son ought to inherit; for there is a reason for this, &c. But this custom is against reason; for if he may dig in one place, he may dig in another place: and so, if a man hath a meadow adjoining the sea, they may, by such custom, destroy all the meadow, which would not be reasonable. *DANBY.* Those who are fishers in the sea may justify their going on the land adjoining to the sea; for such fishery is for the commonwealth, and for the sustenance of all the realm, &c.; wherefore this is common law, quod fuit concessum. (This, it may be observed, as far as it extends to the land above high water mark, is contrary to *Ball v. Herbert*, unless where it is founded on custom. Such a custom may be good where a right to dig is not claimed, or the doing so may be justified under such circumstances as I shall afterwards state from Lord HALE.)

CHOKE. If I have land adjoining to the sea, so that the sea ebbs and flows on my land, when it flows, every one may fish in the water which has flowed on my land, for then it is parcel of the sea, and in the sea every one may fish of common right, &c. ; and, Sir, when the sea is ebb'd, then in this land, which was flow'd before, peradventure he may justify his digging, &c. ; for this land is of no great profit to me, &c." It, therefore, clearly appears that this case proceeded entirely upon a particular custom, and the doctrine laid down by **CHOKE, C. J.**, may be true, where there is such a custom; and such a custom, confined to the sea-shore, may perhaps be good; but, if founded solely on the common-law, is inconsistent with many passages in Lord Hale. By the common law, though the shore, that is to say, the soil betwixt the ordinary flux and reflux of the tide, as well as the sea itself, belongs to the king; yet it is true that the same are also *prima facie* publici juris, or clothed with a public interest. But this *jus publicum* appears from Lord Hale to be the public right in all the king's subjects, of navigation for the purposes of commerce, trade, intercourse: and also the liberty of fishing in the sea, or the creeks or arms thereof, which Lord Hale, *de Jure Maris*, p. 11, says, the common people of England have regularly, as a public common of piscary, and which, he says, they may not, without injury to their right, be restrained of, unless in such places, creeks, or navigable rivers where either the king or some particular subject has granted a propriety, exclusive of that common liberty. Neither in Lord Hale's treatise, nor elsewhere, does it appear that there is a common-law right in the king's subjects in general, or any of them, to appropriate the sea-shore, or the soil even below the low water mark, for general purposes, though temporary only, to their own use, without the king's grant or license, even where that can be done without nuisance to his subjects. Such an appropriation by any of the king's subjects, without his grant or license, though it were not in law a nuisance, would be (see Lord Hale, *De Portibus Maris*, 85,) where the soil remains the king's, a purpresture, and encroachment, and intrusion upon the king's soil, which he may either demolish or seize, or rent, at his pleasure; and though it were even by building below the low water mark, it would not, as Lord Hale there says, be *ipso facto* a common nuisance, unless it be a damage to the port or navigation; but where it is a common nuisance, as he also there says, even the king himself cannot license it. This shows that by the common law, the king's subjects have not a general right of using or appropriating the soil of the sea-shore, or of the sea itself, as they please, even where the soil remains the king's, clothed with the *jus publicum*, and where that use or appropriation is effected in such a manner as not to be a nuisance to the public right of others.

But, further, such a general public right in all the king's subjects, to use the sea-shore for all such temporary purposes as they please, would be, I think, inconsistent with the nature of permanent private property, or with the sea-shore becoming such permanent private property. If, therefore, the right of bathing, and the right of passing over the sea-shore on foot and with carriages, claimed as incident thereto, be claimed under the supposed general right of the public to use the sea, and the

shore, for all such temporary legal purposes as they may please, such a public right of general appropriation is inconsistent with the fact of the locus in quo being private property, and of the fishing therein being also a private exclusive right, as stated in the case. And if the right of bathing, and of the incident foot and carriage way claimed for that purpose, cannot be established under such a general claim of right as I have before stated, it can only be supported under the specific claim of a public right of bathing, and of a carriage-way, as incident thereto; for to that extent it must be established, in order to entitle the defendant to the judgment of the Court. And then, I ask, where is such a right of bathing on the sea-shore, where it has become private property, and may immemorially have been, and of a carriage-way for that purpose as incident thereto, when sought for, to be found as existing at the common law, independently of usage and custom; a right too, which is here claimed beyond the extent of the usage actually found in the case? Where the soil remains the king's, and where no mischief or injury is likely to arise from the enjoyment or exercise of such a public right, it is not to be supposed that an unnecessary and injurious restraint upon the subjects would, in that respect, be enforced by the king, the *parens patriæ*. Where there is, and has hitherto been, a necessity, or even urgency, for such a right, it must, or most probably will have, usage and custom in the place to support, regulate, limit, and modify it; for, whenever there has been a necessity for it, there, as far as such necessity has existed, some usage must have prevailed.

In *Ball v. Herbert*, T. R. 261. Lord Kenyon, in speaking of common-law rights, says, "Common-law rights are either to be found in the opinions of lawyers delivered as axioms, or to be collected from the universal and immemorial usage throughout the country." And ASHURST, J., says, "It seems extraordinary (if there be any such right) that it is not defined with greater certainty in any of our law books: for it is a right that in its nature must, if it existed, be subject to some restrictions, as, that it should be exercised only on one, and that the most convenient side of the river; for it would, in many instances, be a very oppressive right, if it could be claimed on both sides." And BULLER, J., says, "This being claimed as a common-law right, it can only be proved to exist by one of the means mentioned by my Lord, as to general usage throughout the kingdom, of which the Court is obliged to take notice; That clearly does not exist. Then the question is, whether in our books, or on records, that right is established for which the defendant contends. The case in Lord Raymond is a very loose and inaccurate note. Another authority cited is a passage in Bracton, and quoted by Callis: that plainly appears to have been taken from Justinian, and is only part of the civil law; and whether or not that has been adopted by the common law, is to be seen by looking into our books, and there it is not to be found." The present claim, to the extent to which it is necessary to establish it on the part of the defendant, is not, therefore, as it appears to me, supported either by necessity, by general usage of the realm, which forms the common law, or by special usage in the particular place; nor is it to be found in our law books; nor, if it were, would it follow, that it was such a common-law right, as might

not, by prescription at least, be otherwise appropriated. That general common-law rights are frequently so appropriated, we all know to be the fact; and that this may lawfully be established, by prescription at least, will appear from authority. The public common-law rights, too, with respect to the sea, &c., independently of usage, are rights upon the water, not upon the land, of passage and fishing on the sea, and on the sea-shore, when covered with water; and though, as incident thereto, the public must have the means of getting to and upon the water for those purposes, yet it will appear that it is by and from such places only as necessity or usage have appropriated to those purposes, and not a general right of lading, unlading, landing, or embarking where they please upon the sea-shore, or the land adjoining thereto, except in case of peril or necessity. In *Carter v. Murcott*, 4 Burr, 2162, YATES, J., (speaking of a prescription for a several fishery, claimed in a navigable river,) says, "Such a right may be proved. By the law of England, what is otherwise common, may, by prescription, be appropriated. Grotius owns that navigable rivers may be appropriated. The case of *The Royal Salmon Fishery in the River Banne*, in Sir John Davis' Reports, is agreeable to this; and it is a very good case."

Many passages in Lord Hale's Treatise are inconsistent with the existence of such a general right of bathing, and of a passage over the shore with carriages, at common law, as is here claimed, and show that whatever the general public rights are, that they are only such as are upon and in the water, and not upon the dry land, unless in places sanctioned by usage, whether they be parts of the shore or not; at least, that they exist not upon the land, when not covered with water, where it has become private property, and, more especially, where it has immemorially been private or special property. I shall state a few of those passages. It appears from Lord Hale, that the king may license the erecting of quays, or other buildings, on the sea-coasts, even below the low-water mark, where they are not in fact annoyances or nuisances, Hale, De Portibus Maris, 85: so wears Hale, 22, De Jure Maris. As to the making of ports, and the three-fold right therein, especially the right of an individual subject, by charter or prescription, in a port, and previously in a creek or haven, particularly in bringing in his own goods, where he is owner of the soil, Hale, 72, 73. As to the owner's right to improve the shore, it is laid down that the king cannot grant a right to lade or unlade on the ripa or bank, without the owner's consent; there cannot therefore be any common-law right to lade or unlade on the quay or shore, or land adjacent in the port, Hale, 51, 76. Evidence to prove the shore parcel of a manor, &c., disproves the general right of all the king's subjects on the shore, at least when and where it is not covered with water. So, as to having the right of royal fish and wreck, it is a great presumption that the shore is part of the manor, or otherwise he could not have them, Hale, 26, 27. Now, this would not be the case, if the king's subjects had a prior general right to come when they pleased upon the shore. These passages from Lord Hale appear to me to be inconsistent with the general right contended for, independently of custom, for all the king's subjects to come as and when they

please upon the shore, particularly where it has been either from time immemorial, or where it has since become private or special property, especially where it is not covered with the tide or water. Lord Hale notices and establishes the public right of navigating and fishing upon and in the water, and the right of resort to the ports, and of lading and unlading, landing and embarking therein, either at the public places appointed, or by usage established for those purposes, or with consent, upon the land, either of the king or of individuals, but no further. This right of bathing, and of a carriage-way, as incident thereto, is no where noticed; and it does not, I think, exist by the common law upon the locus in quo, the private property of the plaintiff, unsupported as it is by usage and custom. I am, therefore, of opinion, in this case, that the plaintiff is entitled to the judgment of the Court.

BAYLEY, J. The question in this case is, whether there is a common-law right for all the king's subjects to bathe upon the sea-shore, and to pass over it for that purpose, on foot, and with horses and carriages, notwithstanding the part on which the right is claimed, is, as to its soil, vested in a particular individual, and although that individual has an exclusive right of fishing in that place with stake-nets, and of driving these stakes into the soil, that they may support the nets. And I am of opinion, that there is no such common-law right. By the sea-shore, I understand the space between the ordinary high and low-water mark, and the property in this is, *prima facie*, in the king. It may, indeed, by grant or prescription belong to a subject, but until the contrary is shown, the presumption is, that it belongs to the king. Many of the king's rights are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all his subjects have the right of navigation, and of fishing, and it is so in highways, along which all his subjects have the right of passage, and the king can make no modern grants in derogation of those rights. I have mentioned the rights of navigation and of fishing, because I can find no trace of such a right as that now claimed recognized in any of our books. It is material to distinguish between the different descriptions of rights which is for the general benefit of all the kingdom; and the public may have a right of navigation, and a right of fishing, which tends to the sustenance and beneficial employment of individuals; but it does not thence follow that they have also the right of bathing. The existence or the extent of the subject's right is to be collected in this, as in other instances, from the manner in which the sea-shores throughout the kingdom have from time immemorial been used, and from legal authorities upon the subject. The right, as claimed, is not confined to any particular place, if it exists at all, but it must exist upon every part of the sea-shore. Every private building, then, erected upon the sea-shore, and even wharfs and quays, would be an obstruction to that right, and, of consequence, abatable or indictable. And yet, in how many instances are such buildings, wharfs and quays erected? Every embankment by which land is redeemed from the sea would obstruct the exercise of this right, and be a nuisance, and so would the erection of stakes for holding nets; and yet, how frequently are such embankments made, and such stakes set up? A distinction has, indeed, been contended for between wharfs

and quays, and other erections for public benefit, and for the interests of trade and commerce, and erections for private purposes; but in how many instances are there buildings for private purposes on the sea-shore? Where an erection is made on the sea-shore without authority, the crown may treat it as a purpresture, and prosecute it accordingly; but it has never yet been held abateable or indictable, because it happens to interfere with a supposed common-law right of bathing. Indeed, this is the first time, as far as I can learn, that such a right was ever stated upon any pleadings, or contended for in any court of law; and the inconveniences which would result from such a right afford to my mind a strong argument against its existence. In sea-bathing, as it now prevails, particular regulations are desirable; the restriction of particular machines to particular spots; a separation of those which are for men from those which are for females; and the prevention of contests as to particular situations. Bathers who do not use machines should be in places of greater privacy, and at a distance from those parts which are generally used for the recreation of walking; and yet the existence of this common-law right would be a great obstruction to any such regulations. Indeed, if an individual had the grant of the sea-shore from the crown, and were using it for recreation or bathing, he or his family might be interrupted and deprived of all privacy by the exercise of this common-law right. Let it be observed, too, that the whole shore cannot be necessary for the exercise of this supposed right, and that it may be desirable to apply parts of the sea-shore to other purposes. The king, for the public welfare may suffer such a right to be exercised in those parts of the shore which remain in his hands to any extent which the convenience of the public may require; but may he not also allow other rights to be exercised on other parts? If the soil is vested in an individual, is he to be deprived of the right of saying how that soil shall be used, and of the privilege of making any regulations he may think fit? In those places in which convenience has required the right, and it has continued from the time of legal memory, there will be a right by custom; and where that is not the case, the crown, or its grantees, are not likely to withhold it, upon proper terms, and under proper regulations. The case of *Bagott v. Orr*, 2 Bos. & Pul. 472, seems to me to conclude nothing on the right in question. The defendant there justified trespassing on the rocks and sands lying within the flowing and re-flowing of the tide, on the ground that every subject of the realm had the liberty and privilege of getting and taking away shell-fish and shells which had been left there by the tide. The general right of the public to take fish of the sea was admitted in argument; but the right to take shells cast on the shore was denied: and it was insisted, besides, that the general right was excluded where the shore was parcel of a manor. The Court thought that the plaintiff should have replied specially to have raised the question as to excluding the general right; but they thought the claim as to the shells so questionable, that they offered the defendant leave to amend, by continuing his claim to the sea-fish, and that offer the defendant accepted. The claim, therefore, in that case, was very different from the present; it was a claim for something serving to the sustenance of man, not a

matter of recreation only,—a claim to take, when left by the water, what every subject had an undoubted right to have taken whilst they remained in the water; and upon that claim there was no regular judgment. But it would by no means follow because all the king's subjects have a right to pick up fish on the shore, that they have therefore a right to pass over the sea-shore for the purpose of bathing. The passages cited from Lord Hale's treatise, *De Jure Maris*, p. 22 and 36, in which it is laid down, "that the *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or arms of the sea are affected for public use," leave the question untouched; because the question in this is, what the *jus publicum* is, and that they do not define. Had Lord Hale stated as part of the *jus publicum*, that the public might use the shore as they thought fit; that they might use it as a public highway, or for the purpose of bathing; then those passages would have been authorities applicable to this case. But Lord Hale, in fact, only states that the *jus publicum* continues to exist, without defining what it is. Bracton, in l. 1, c. 12, s. 6, does state what the *jus publicum* is; and if that passage be good law, it is strong authority in favour of the defendant. The passage is as follows: "*Publica vero sunt omnia flumina et portus. Ideoque jus piscandi omnibus commune est in portu et in fluminibus.*" Now, he does not even say navigable rivers, but I will assume that by *fluminibus* is meant navigable rivers, and so far as I have cited the passage, I concur in what is there laid down; but he goes on: "*Riparum etiam usus publicus est jure gentium sicut ipsius fluminis.*" That is, that the public have the same right to use the banks of the river that they have to use the river itself, and that, because the water is common to all mankind, the *ripa* is also common to all mankind. The passage then goes on, "*Itaque naves ad eas applicare, funes arboribus ibi natis religare, onus aliquod in iis reponere, cuivis liberum est, sicut per ipsum fluvium navigare.*" The word "*ripa*" here applies to rivers and ports, and probably also to the land above the high-water mark, and, if it does, is this the law of England? have all persons a right to fasten a ship to the banks of a river, or have they a right to tie ropes to the trees, or to land goods on the bank of every navigable river? The case of *Ball v. Herbert*, 3 Term. Rep. 262, is not a distinct authority upon this point, inasmuch, as in that case, the right of towing was claimed. But the general question as to the right of the public on the *ripa* of a navigable river was discussed, and the Court appear to have been of opinion, that the *ripa* of a navigable river was not *publici juris*, and they therefore virtually overruled the authority of Bracton. Lord Hale, in his treatise, *De Portibus Maris*, p. 84, after citing this passage, says, "As touching ports, and the public right of them, Bracton saith true; with this allay, that hath been before observed, that the law of England doth thus far abridge that common liberty of ports, that no port can be erected without the license or charter of the king, or that which presumes and supplies it, viz.: custom and prescription." But in another passage, page 73, Lord Hale says, "Though A. may have the propriety of a creek or harbour, or navigable river, yet the king may grant there the liberty of a port to B., and

so the interest of the propriety, and the interest of the franchise, several and divided. And in this, no injury is at all done to A., for he hath what he had before, viz.: the interest of the soil, and consequently the improvement of the shore, and the liberty of fishing; and as the creek was free for any one to pass in it against all but the king, (for it was *publici juris*, as to that matter before,) so now the king takes off that restraint, and by his license and charter, makes it free for all to come and unlade. But if A. hath the *ripa* or bank of the port, the king may not grant a liberty to unlade upon that bank or *ripa* without his consent unless custom had made the liberty thereof free to all, as in many places it is; for that would be a prejudice to the private interest of A., which may not be taken from him without such consent." There may perhaps be a distinction between the *ripa* of the river where the soil has been long private property, and that space between the high and low-water mark, where the sea ebbs and flows, but if there be such a distinction, what becomes of the authority of Bracton, where he says, "*Riparum etiam usus publicus, est jure gentium sicut ipsius fluminis?*" No man can travel through this kingdom along the banks of rivers, without seeing that private rights, exclusive of public rights, exist there, and every one of those rights is at variance with the doctrine of Bracton, and with the supposed common-law right now claimed. The practice of bathing may contribute to health, but it ought to be confined within reasonable limits, and it is by no means necessary, that the right should be co-extensive with the whole shore of the sea, or that it should extend to places where the right of fishing with stake-nets exists. In the absence of any authority, to show that such right exists, and thinking that the authorities cited do not establish it, and that it would be attended with great inconvenience to the public, if a general right, free from all regulation by the owner of the soil was to be exercised throughout the whole of the kingdom, I am of opinion, that no such right exists, and, consequently, that there ought to be judgment for the plaintiff.

ABBOTT, C. J. I have considered this case with very great attention, from the respect I entertain on this and all other occasions for the opinion of my learned Brother BEST, though I had no doubt upon the question when it was first presented to me; nor did the defendant's counsel raise any doubt in my mind by his learned and ingenious argument. This is an action of trespass, brought against the defendant for passing with carriages from some place above high-water mark across that part of the shore which lies between the high and low-water mark, for the conveyance of persons to and from the water for the purpose of bathing. The plaintiff is the undoubted owner of the soil of this part of the shore, and has the exclusive right of fishing thereon with stake-nets. The defendant does not rely upon any special custom or prescription for his justification, but insists on a common-law right for all the king's subjects to bathe on the sea-shore, and to pass over it for that purpose on foot, and with horses and carriages; and this right is the only matter which, by the terms of the special case, is submitted to the opinion of the Court. Now, if such a common-law right existed, there would probably be some mention of it in our books; but none is found in any book, ancient or modern. If the right exist now, it must

have existed at all times: but we know that sea-bathing was, until a time comparatively modern, a matter of no frequent occurrence, and that the carriages, by which the practice has been facilitated and extended, are of comparatively modern invention.

There being no authority in favour of the affirmative of the question, in the terms in which it is proposed, it has been placed in argument at the bar on a broader ground; and as the waters of the sea are open to the use of all persons for all lawful purposes, it has been contended, as a general proposition, that there must be an equally universal right of access to them, for all such purposes, over land like the present. If this could be established, the defendant must undoubtedly prevail; be cause, bathing in the waters of the sea is, generally speaking, a lawful purpose. But in my opinion, there is no sufficient ground, either in authority or in reason, to support this general proposition.

Commerce is a matter greatly favoured in our law, by reason of the public and national benefits derived from it; but, even as to this favoured matter, I have found no authority in the law of England in support of such a proposition. Bracton, in the passage so often referred to, speaks not of the waters of the sea generally, but of ports and navigable rivers. It may be admitted, that whatever is true of navigable rivers and their banks, may be true of the sea and of its shore. But the case of *Ball v. Herbert*, 3 T. R. 261, shows that the doctrine of Bracton, as to the banks of navigable rivers, however warranted by the civil law, is not conformable to the law of England. "And as touching ports, and the public right to them," says Lord Hale, p. 84, "Bracton saith true: but with this allay, that the law of England doth thus far abridge that common liberty of ports, that no port can be erected without the license or charter of the king, or that which presumes and supposes it, viz.: custom and prescription." So that even the privilege to be derived from ports cannot be in its nature universal. And, as to ports, Lord Hale, ch. 6, p. 73, distinguishes between the interest of property and the interest of franchise, and says, "that if A. hath the ripa or bank of the port, the king cannot grant liberty to unlade on the bank or ripa without his consent, unless custom hath made the liberty thereof free to all, as in many places it is." Now, such consent as applied to the natural state of the ripa or bank would be wholly unnecessary, if every man had a right to land his goods on every part of the shore at his pleasure. And, if there be no general right to unlade merchandise on the shore, there can be no right to traverse the shore with carriages, or otherwise, for the purpose of unlading; and, consequently, the general proposition to which I have alluded, cannot be maintained as a legitimate conclusion from the general right to navigate the water. I have spoken of merchandise, and not of fish; from the latter I studiously abstain, because no question of that kind is before the Court, and it is unnecessary to say any thing upon it. It will be remembered, also, that I speak only of the general right, which is a matter perfectly distinct from those cases of necessity that often arise out of the perils of navigation. Having thus shown that the general proposition cannot, in my opinion, be maintained, I return to the particular right or privilege claimed in the present case.

One of the topics urged at the bar in favour of this supposed right, was that of public convenience. Public convenience, however, is, in all cases, to be viewed with a due regard to private property, the protection whereof is one of the distinguishing characteristics of the law of England. It is true, that property of the description of the present is, in general, of little value to its owner; but I do not know how that little is to be protected, and much less how it is ever to be increased, if such a general right be established. If there be a general right of passage across land of this description in the nature of a highway, by what law are stake-nets, or other implements of fishing, to be placed there, or sand or stones to be taken away, whereby the exercise of the right which, as claimed, will, in its universality, extend itself over every part of the surface, may be obstructed, or rendered less convenient? By what law can any wharf or quay be made? These, in order to be useful, must be below the high water mark, that vessels or boats may float to them when the tide is in; but when the tide is out, no carriage can pass them. In some parts of the coast, where the ground is nearly level, the tide ebbs to a great distance, and leaves dry very considerable tracts of land. In such situations, thousands of acres have, at different times, been gained from the sea and its arms by embankments, and converted to pasture or tillage. But how could such improvements have been made, or how can they be made hereafter, without the destruction or infringement of this supposed right? And, it is to be observed, that wharves, quays, and embankments, and in takes from the sea, are matters of public as well as private benefit.

Another topic relied upon by the defendant was usage and practice. The practice of modern times can be considered, at the utmost, in the nature only of evidence, more or less cogent according to its extent and uniformity. I am not aware of any practice, in this matter, sufficiently extensive or uniform to be the foundation of a judicial decision. It was said at the bar, that in some places a compensation is made to the owner of the shore; but I do not rely on this assertion as a ground of judgment. In many places, doubtless, nothing is paid. In some parts, the king is the owner of the shore: and it is not probable that any obstruction would be interposed on his behalf to such a practice. Of private owners, some may not have thought it worth while to advance any claim or opposition; others may have had too much discretion to put their title to the soil to the hazard of a trial by an unpopular claim to a matter of little value; others, and probably the greater part, may have derived or expected so much benefit from the increased value given to their own land above by the erection of houses and the resort of company, that their own interest may have induced them to acquiesce in, and even to encourage the practice, as a matter indirectly profitable to themselves. But, further, the practice, as far at least as I am acquainted with it, differs in degree only, and not in kind or quality, from that which prevails as to some inland wastes and commons; and even the difference in degree is, in some instances, not very great. Many of those persons who reside in the vicinity of wastes and commons, walk or ride on horseback, in all directions, over them, for their

health and recreation; and sometimes, even in carriages, deviate from the public paths into those parts which may be so traversed with safety. In the neighbourhood of some frequented watering-places, this practice prevails to a very great degree; yet no one ever thought that any right existed in favour of this enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil.

The only remaining topic adduced for the defendant was, that the right may be considered as confined to those instances only wherein it can be exercised without actual prejudice to the owner of the shore, and subject to all modes of present use, or future improvement, on his part; but no instance of any public right, so limited and qualified, has been found. Every public right to be exercised over the land of an individual is, *pro tanto*, a diminution of his private rights and enjoyments, both present and future, so far as they may at any time interfere with or obstruct the public right.

But, shall the owner of the soil be allowed to bring an action against any person who may drive his carriage along these parts of the sea-shore, whereby not the smallest injury is done to the owner? The law has provided suitable checks to frivolous and vexatious suits; and, in general, experience shows that the owners of the shore do not trouble themselves or others for such matters. But where one man endeavours to make his own special profit by conveying persons over the soil of another, and claims a public right to do so, as in the present case, it does not seem to me that he has any just reason to complain, if the owner of the soil shall insist upon participating in the profit, and endeavour to maintain his own private right, and preserve the evidence thereof. For these reasons, I am of opinion that there is not any such common-law right as the defendant has claimed.

Judgment for the plaintiff

END OF MICHAELMAS TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
Hilary Term,

IN THE
Second and Third Years of the Reign of GEORGE IV., 1822.

HAYWARD *v.* HORNER.*—p. 317.

In order to constitute the offence of keeping a setting-dog, within the 5 and 6 Anne, c. 14, s. 4, the dog must be kept for the purpose of killing and destroying game; and, therefore, where it appeared that, at the time when the alleged offence was charged to have been committed, the dog was tied up, and never went out into the field with his master, this was held not to be an offence within the statute.

DECLARATION in debt, on the statute 5 & 6 Anne, c. 14, s. 4, against defendant as an unqualified person, for keeping, on different days in March, 1821, a setting-dog, to kill and destroy game. Plea, nil debet. At the trial, before BURROUGH, J., at the last assizes for the county of Essex, it was proved by the plaintiff's gamekeeper, that the defendant, during the year 1821, had kept a setting-dog, which he had seen him use in 1819. There was no proof that any use had been made of the dog by the defendant during the last season; and on the contrary, his servant proved, that, subsequently to the shooting season, which commenced in September, 1819, the dog had generally been tied up, and that he had never seen his master take it out into the field after January, 1820. It was contended by *Gurney*, for the defendant, on the authority of the case of *Read v. Phelps*, 15 East, 271, that the mere fact of keeping a sporting-dog was not evidence of keeping it for the purpose of destroying game; and that, in order to constitute an offence within the statute, the dog must be kept for the purpose of killing or destroying game. The learned Judge was of opinion, that in an action of this sort it was sufficient to prove the keeping of any of the dogs mentioned

* This and several following cases were argued at the sittings before term.

in the 22 & 23 Car. 2, c. 25, the 4 & 5 W. & M. c. 25, and 5 Anne, c. 14; the legislature having considered such dogs to be dogs for the destruction of game. He therefore directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi for that purpose having been obtained in last term,

Marryat now showed cause. The statute enacts, that an unqualified person who shall keep or use any greyhounds, setting-dog, &c., to kill and destroy game, shall be liable to a penalty. The words to kill or destroy game, apply only to the using of the dogs, and not to the mere keeping. Two offences are created, one for keeping, the other for using. The statute does not say that the dogs must be kept for the purpose of destroying the game; but to make a party guilty of the offence of using the dog, it must have been used to kill and destroy game. In *Read v. Phelps*, 15 East, 271, the dog was so young that it could not have been used to kill game. In *Wingfield v. Stratford*, Sayer, 15, 1 Wils. 315, S. C., LEE, C. J., takes this distinction; "As greyhounds, setting-dogs, &c., are expressly mentioned in this statute, it is not necessary to allege that any of these have been used for killing or destroying game, and the rather as they can scarcely be kept for any other purpose than to kill and destroy game. But as guns are not expressly mentioned, and as a gun may be kept for the defence of a man's house, and for other lawful purposes, it is necessary to allege, in order to its being comprehended within the meaning of the words 'any other engines to kill the game,' that the gun had been used for killing the game."

Gurney, contra, was stopped by the Court.

ABBOTT, C. J. I am clearly of opinion, that, in order to constitute an offence within the statute 5 & 6 Anne, c. 14, s. 4, the dog must be kept or used for the purpose of killing or destroying game. It did not appear in this case, that, at the time when the offences charged were alleged to have been committed, the dog was kept for that purpose. I think, therefore, that the verdict was wrong, and that the rule for entering a nonsuit must be made absolute.

BAYLEY, J. I am of the same opinion. The words "to kill and destroy game," apply to both the precedent words "keep or use." It is usual in pleading to allege, that the dogs are kept to kill and destroy game; now such an allegation would be wholly unnecessary, if the words kill and destroy game did not apply to all the precedent words. Generally speaking, the very keeping of a dog of the description mentioned in the act would be prima facie evidence that it was kept for that purpose; but, supposing it to be proved, on the other hand, that the dog was tied up during the day and let loose only at night, the jury would fairly be warranted in presuming that it was kept for the defence of the house, and not for the purpose of destroying game. Indeed, these dogs are frequently kept for the purposes of sale. Now it is perfectly clear, that a person so keeping them, is not liable to the penalties of this act of parliament.

HOLROYD, J. I am of the same opinion. In the case cited from *Sayer*, Lord Chief Justice LEE only says, "That it is not necessary to

allege that the specified dogs were used for the purpose of killing game." That case does not apply to the present, where the offence is the keeping of dogs for that purpose. This very point arose in the case of *Briarly v. Athorpe*, which was tried the Lent assizes, 1792, before BULLER, J., at York;* and he was of opinion, that, in order to bring the case within the statute, it was essential that the dog should be kept for the purpose of killing and destroying game.

BEST, J. I am of the same opinion. This is a penal statute, and ought, therefore, to be construed strictly. The keeping or using a dog, of the particular description mentioned in the statute, to kill and destroy the game, constitute two distinct offences; and I am of opinion, that the mere keeping of such a dog does not constitute an offence, unless it be for the purpose of killing and destroying game. The mere keeping of such a dog, may, indeed, be *prima facie* evidence of the purpose for which it is kept. In this case, however, it has been considered as conclusive evidence of that purpose. Here there was proof to rebut the *prima facie* presumption; for it was in evidence, that the dog, during the time in which the offence is laid in the declaration, was generally tied up, and never followed his master. I think, therefore, that in this case there was strong evidence to go to the jury, that the dog was not kept for the purpose of killing and destroying the game, and that the jury would have been warranted in coming to that conclusion. That being so, I think that the rule for entering a nonsuit ought to be made absolute.

Rule absolute.

* BRIARLY v. ATHORPE.

Coram BULLER, J., Yorkshire Lent Assizes, 1792.

TROVER for a pointer-dog, seized by the defendant, lord of the manor and a justice of the peace, as being in the custody of an unqualified person. *Cockell*, Serjt., for the plaintiff, insisted, that the defendant had not, either as lord of the manor or as a justice of the peace, a right to seize the dog. First, as not being a setting-dog, nor included within the act (stat. 5 & 6 Anne, c. 14). Secondly, as not being kept for the purpose of killing game, but as a house-dog, and for defence, plaintiff having used the dog to kill game before he sold his estate, which qualified him, but never since, having kept him expressly for the purpose of a house-dog.

BULLER, J. The first question is, whether a pointer is a setting-dog within the act. I am of opinion, a pointer is within the act of parliament.

It is a well known rule, in expounding acts of parliament, to consider all the acts in *pari materia*. Stat. 22 and 23 Car. 2, c. 25, s. 2, mentions other dogs. A setting-dog, I think, means any dog who *stope* at his game. But it is essential that it must be kept or used to kill game. If not, the word greyhound, would extend to an Italian greyhound kept by a lady for her amusement. So "hays." There is no difference that I know between hays and a cabbage-net; but keeping a cabbage-net or hays to put over cabbages is not unlawful. It must be kept or used to kill game, to entitle the lord to seize. If you (the jury) think the dog was used to kill game in September or October, 1790, being since the plaintiff sold his property, there must be a verdict for the defendant. If not, then the plaintiff is entitled to a verdict. Verdict for plaintiff, damages 10*l*.

See *Rez v. Filer*, Strange, 496. *Rez v. Gardner*, Strange, 1098. *Rez v. Thompson*, 2 T. R. 18.

DUNK v. HUNTER.—p. 322.

A landlord has no right to distrain, unless there be an actual demise to the tenant at a fixed rent; and, therefore, where a tenant was in possession, under a memorandum of agreement to let on lease, with a purchasing clause, for 21 years, at the net clear rent of 63*l.*, the tenant to enter time on or before a particular day: *Held*, that this only amounted to an agreement for a future lease, and that no lease having been executed, and no rent subsequently paid, the landlord was not entitled to distrain.

REFLEVIN, for taking and distraining plaintiff's goods in his dwelling-house, on the 15th March, 1821. Avowry that plaintiff, for one year, ending February 11th, 1821, held, as tenant to defendant, at the yearly rent of 63*l.*, payable quarterly, and that defendant distrained for one year's rent in arrear. Plea, first, that he was not a tenant; second, that the rent was not in arrear. The cause was tried before BURROUGH, J., at the last Summer assizes for Sussex, when it appeared, that, on the 19th March, 1819, the following agreement was entered into between the parties. "Memorandum of an agreement between Mrs. Ann Hunter, of Southwick, and David Dunk, of Brighton, butcher. Mrs. Ann Hunter agrees to let on lease, with purchasing clause, for the term of 21 years, all that house and premises, St. James' Street, present tenant Thomas Lawler; entering on the said premises by D. Dunk, any time on or before the 11th day of February, 1820, at the net clear rent of 63*l.* per year, and to keep all premises in as good repair as when taken to (reasonable wear allowed,) paying on entry 50*l.* in ready cash, and the rent payable quarterly. The term for 7, 14, or 21 years, which term Mr. D. Dunk is to give one clear year's notice, before the expiration of either of the above term of years, if he intends to leave; if purchases before the expiration of the above term by D. Dunk, he is to pay on purchase 1000 guineas."* The plaintiff, under this agreement, paid the sum of 50*l.* on the 10th February, 1820; but in consequence, as it was said, of some arrangement between him and the former tenant, he did not enter into the occupation of the premises till the 10th April following. In the March preceding, an application was made, and a lease tendered to the defendant to execute, but she declined to do so, saying, that she had found she could not grant one. No rent had been paid by the plaintiff. The jury found a verdict for the defendant. Marryat, in last Michaelmas term, obtained a rule nisi for entering a verdict for the plaintiff, on the ground that the above agreement did not amount to a lease; and that, unless the plaintiff held under a demise, at a specific rent, the defendant had no right to distrain for rent-arrear. And now,

Gurney and Courthope showed cause. In this case, the plaintiff was tenant to the defendant, for the agreement amounted to a lease. Here the defendant agreed to let at a specified rent, and the plaintiff has paid the 50*l.*, and entered into possession under the agreement. He cannot, therefore, now say, that he did not hold at that rent. Then, the rent being due, the distress was legal. *Tempest v. Rawling*, 13 East, 18.

* This is a copy of the original memorandum, except that the spelling has been corrected.

Marryat and Chitty, contra. There must be a demise at a specific rent, in order to entitle a landlord to distrain. He cannot distrain for a quantum meruit. The only remedy in such a case is, by an action for use and occupation. Then if so, the question is, whether this is an agreement for a lease, or a lease; and clearly, it is the former only. Here it specifies, that defendant agrees to let on lease with a purchasing clause; that shows a future lease must have been contemplated. The rent too, must mainly depend, for its amount, on the beneficial clauses which were to be introduced into the future lease. *Hegan v. Johnson*, 2 Taunton, 148, is not distinguishable from the present case. As to *Tempest v. Rawling*, there is this distinction, that in that case there had been a payment of rent; which there has not been here.

ABBOTT, C. J. On looking through the whole of this instrument, which has obviously been framed by an unlettered person, it appears to me, that this is only an agreement preparatory to a demise, and not an actual demise. If it had been the latter, then the defendant would have been entitled to distrain for the rent. But it seems to me that it is not so. It has not any one of the forms of the lease. It begun thus, "Memorandum of an agreement; Mrs. Ann Hunter agrees to let on lease" (which obviously means to execute a lease) "with a purchasing clause for the term of 21 years, the tenant to enter on the premises at any time on or before the 11th February, 1820, &c." Now, looking at this instrument, I cannot infer when the tenancy was to commence or the rent to become due. The whole is left in doubt, and it is manifest that this was intended as a mere memorandum of an agreement to grant a future lease. Then the question is, whether the allegation in the avowry is sustained by the proof. A party has no right to distrain, unless there be a fixed rent agreed upon; if that be not so, the law gives him a remedy by the action for use and occupation. There can be no distress, unless there be a contract for an actual demise at a specific sum. Where the language of the instrument is such, as to make it a valid contract until something further be done, such instruments have, in some cases, after an actual enjoyment under them, been held to amount to an actual demise. But here it does not amount to a demise at a certain rent, and therefore the defendant was not entitled to distrain, and cannot sustain the allegation in the avowry. The rule must therefore be made absolute.

BAYLEY, J. The allegation in the avowry is, that the plaintiff held the premises as tenant thereof to the defendant, by virtue of a demise thereof to him the plaintiff theretofore made. The first question is, whether this memorandum of an agreement amounts to a demise for 21 years. If it does, then the allegation in the avowry is made out in evidence. In the case of *Morgan v. Bissell*, 3 Taunt. 65, the rule is laid down thus, that although there are words of present demise, yet if you collect on the face of the instrument, the intent of the parties to give a future lease, it shall be considered an agreement only. It is clear in this case, that the memorandum of agreement was not intended to operate as a present demise. We cannot ascertain from the language of the instrument, when the term was to commence. There are no

words of demise, nor any words from which a warranty of title may be implied, as would be the case if the word "grant" had been inserted. The meaning of the parties seems to have been, that if the defendant entered before the 11th February, the term was to commence from the period of such entry. Upon the whole, therefore, it seems to me, that the parties contemplated the execution of a future lease. Then, if this was not an actual demise for 21 years, the party did not at all events hold at the annual rent of 63*l.*, and if so, the plaintiff by law could not distrain, the rent not being fixed. If a person bargains for a lease for 21 years, the rent is estimated upon an average for the whole term, and it may be of no benefit to the party whatever, for the first year of his occupation. Here, the rent of 63*l.* is estimated on the terms of there being a lease granted, and at the time when the distress was made, no lease was granted, and no payment of rent had taken place. I think, therefore, that the plaintiff did not hold the premises at any specific rent, and that the defendant's only remedy was by an action for use and occupation, in which the amount of the rent would be a question to be left to the jury. This rule, therefore, must be made absolute.

HOLROYD, J. I am of opinion that the defendant was not entitled to distrain. This did not operate as a present demise, but was a mere agreement to let in future, and by a different instrument. And there is nothing to show, that it was the intention of the defendant to part with the premises until that instrument was executed. It is clear, that an agreement to grant a lease does not amount to a letting. Besides, in this case, there are subsequent words relative to the introduction of a clause for purchasing, which show, that the letting was to be by a particular instrument containing such a clause. And in addition to this, the stipulation as to the payment of 50*l.* upon entry, is quite inconsistent with this being an actual demise. For if it were an actual demise, the tenant would have had a right to enter immediately without paying that sum. I think, therefore, that the defendant was not entitled to distrain, and that the rule must be made absolute.

BEST, J., concurred.

Rule absolute

WEST v. ANDREWS.—p. 328.

1. S. being the master of the work-house, appointed by, and receiving orders from, the guardians of the poor of the parish of W., bought provisions from A. B., one of such guardians: *Held*, that A. B. was liable to the penalty of 100*l.* imposed by the 55 G. 3, c. 237, s. 6.

DEBT on 55 G. 3, c. 137, s. 6, for a penalty of 100*l.* Declaration stated, that defendant, on 1st June, 1820, was overseer of the poor of Westhamperett, in Sussex, and during the time he was overseer, furnished and supplied in his own name, goods and provisions for the support of the poor. The second count described him as a person in whose hands the collection of the rates was. Plea, general issue. At

Marryat and Chitty, contra. There must be a demise at a specific rent, in order to entitle a landlord to distrain. He cannot distrain for a quantum meruit. The only remedy in such a case is, by an action for use and occupation. Then if so, the question is, whether this is an agreement for a lease, or a lease; and clearly, it is the former only. Here it specifies, that defendant agrees to let on lease with a purchasing clause; that shows a future lease must have been contemplated. The rent too, must mainly depend, for its amount, on the beneficial clauses which were to be introduced into the future lease. *Hegan v. Johnson*, 2 Taunton, 148, is not distinguishable from the present case. As to *Tempest v. Rawling*, there is this distinction, that in that case there had been a payment of rent; which there has not been here.

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Rule absolute

WEST v. ANDREWS.—p. 328.

L. 8. being the master of the work-house, appointed by, and receiving orders from, the guardians of the poor of the parish of W., bought provisions from A. B., one of such guardians: *Held*, that A. B. was liable to the penalty of 100*l.* imposed by the 55 G. 3, c. 237, s. 6.

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BEST, J., concurred.

Rule absolute

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the trial before BURROUGH, J., at the last assizes for the county of Sussex, it appeared that defendant was one of the guardians of the poor for the parish, and that the poor-house there was under their control, being managed by one Griffiths, who was the master of the poor-house appointed by the guardians, and receiving his orders from them. Griffiths provided for the poor, having a contract at so much per head, and found all the meat, &c. In the year 1820, he bought of the defendant, then being such guardian of the poor, four live sheep for the use of the poor, and paid him for them. The learned Judge thought this not a case within the act, and directed a nonsuit. *Gurney* having in last Michaelmas term obtained a rule nisi for a new trial,

Marryat showed cause. Here, the defendant did not supply the sheep to the parish, and had therefore no claim on the parish. His claim was solely on Griffiths, who had a standing contract with the parish, and full liberty to buy from whom he pleased. The object of the act was, to prevent overseers from availing themselves of their situation, to force their goods on the parish. In *Proctor v. Manwaring*, 3 B. & A. 145, and *Pope v. Backhouse*, 2 B. Moore, 187, the articles were supplied to the individuals receiving relief. Here, that was not the case. If any complaint was made of the provisions supplied, it would be made not to the defendant alone, but to the whole body of guardians.

Gurney and *Merewether*, contra. The case falls within the words and mischief intended to be remedied by the act. If this be allowed, one guardian may supply meat, another flour, &c.; and then, although complaint might be made to the general body, yet they would be all interested not to do justice.

ABBOTT, C. J. I am of opinion, that this is a case within the act of parliament. Here the defendant has made a bargain for the supply of provisions with a third person, who has the contract for providing for the poor, and whom the defendant, in conjunction with others, appoints to his situation, and whose conduct it is his duty to superintend. Under these circumstances, it seems to me, that all the mischief which was contemplated by the legislature would arise, if we were to hold that it was lawful. I am therefore clearly of opinion, that the defendant's case falls both within the words and spirit of the act of parliament, and that the rule for a new trial must therefore be made absolute.

Rule absolute.

GURNEY and Others v. LANGLANDS.—p. 330.

An issue having been directed to satisfy the Court as to the forgery of a signature to a warrant of attorney, a verdict was found, establishing the genuineness of it, upon evidence satisfactory to the judge who tried the cause, and to the Court upon his report of it. In the course of the trial, an inspector of franks, who had never seen the party write, was called to prove, from his knowledge of hand-writing in general, that the signature in question was not genuine, but an imitation; this evidence having been rejected, the Court refused to disturb the verdict, on the ground that such evidence, even if admissible, was entitled to very little weight, and that the issue being to satisfy the Court, a new trial ought not to be granted, unless for the rejection of evidence which might reasonably have altered the verdict. *Quære*, if such evidence be admissible at all.

FEIGNED issue directed by the Court of King's Bench, to try whether the supposed signature of Thomas Gurney the plaintiff, to a certain warrant of attorney, dated 16th April, 1821, was forged. At the trial before Wood, B., at the last assizes for Surrey, the plaintiff, in support of the affirmative of the issue, tendered the evidence of Joseph Hume, inspector of franks at the post-office, who stated, that he was unacquainted with the plaintiff's hand-writing, and was then asked the following question: "From your knowledge of hand-writing, do you believe the hand-writing in question to be a genuine signature, or an imitation." This question was objected to, and the objection allowed by the learned Judge, who stated in his report the following reasons: "When a witness has seen another write, or has, by receiving notes or letters from him, become acquainted with his hand-writing, he has a ground of forming a belief as to it. But where, as in this case, he acknowledges that he had not any previous acquaintance whatever with the hand-writing of the plaintiff, he could not, as I conceived, have any foundation for his opinion or belief, whether the signature in question was genuine or only an imitation; for he had never seen or had any knowledge of that of which it was supposed to be an imitation. There is no general known standard by which hand-writing can upon inspection only be determined to be counterfeited, without some previous knowledge of the genuine hand-writing, the hand-writings of men being as various as their faces. Opinion of skilful engineers and mariners, &c., may be given in evidence in matters depending upon skill, viz.: as to what effect an embankment in a particular situation may have upon a harbour, or whether a ship has been navigated skilfully. Because, in such cases, the witness has a knowledge of the alleged cause, and his skill enables him to judge and form a belief of the effect. I had never known such loose general evidence admitted, or even offered, and it struck me, that the admission of it would produce much mischief, and greatly endanger written securities." The evidence on the part of the defendant, of the subscribing witnesses to the warrant of attorney and others, was so strong, that the jury declared themselves satisfied, and found a verdict for the defendant. *Knowllys*, in last Michaelmas term, obtained a rule nisi for a new trial, on the ground that this evidence was admissible, and had been rejected. And now,

Marryat and *Gurney* showed cause, and suggested that this being an issue to satisfy the conscience of the Court, a new trial ought not

to be granted, unless evidence of a cogent nature had been rejected. And they contended, that whether this was admissible or not, still that, at all events, it could not have produced any alteration in the verdict.

Knowlys and Chitty, contra. *Goodtitle dem. Revett v. Braham*, 4 T. R. 497, and *Rex v. Cator*, 4 Esp. 117, establish the admissibility of the evidence. In *Birch v. Crewe*, London sittings after Trinity term, 1821, the same evidence here offered was received by ABBOTT, C. J. It is impossible to say what effect it might have produced on the jury, because, if not overruled, it would have been followed up by the evidence of many other skilful persons to the same effect. And when evidence has been wholly excluded, the Court will not weigh very nicely what effect it might have had if received.

ABBOTT, C. J. I have long been of opinion, that evidence of this description, whether in strictness of law receivable or not, ought, if received, to have no great weight given to it. This was an issue directed by the Court, in order to enable them to come to a satisfactory conclusion upon a rule pending before them. The other evidence in this case was of so cogent a description as to have produced a verdict satisfactory to the Judge who tried the cause; and I can pronounce my judgment much more to my own satisfaction upon a verdict so found, than if this evidence had been admitted, and had produced a contrary verdict. For I think it much too loose to be the foundation of a judicial decision, either by judges or juries. The rule, therefore, for a new trial must be discharged.

BAYLEY, J., concurred.

HOLROYD, J. I have great doubt whether this is legal evidence; but I am perfectly clear that it is, if received, entitled to no weight; and this being an issue directed to satisfy the Court, we shall best exercise our discretion by refusing a new trial.

BEST, J. There can be no doubt that this is not, in all probability, the natural hand-writing of the party; for it is clear, that if at the time he wrote it he had the intention to dispute the deed, he would not sign it in his usual mode. The evidence, therefore, if received, would be entitled to no weight. It is impossible for any person to speak to hand writing being an imitation, unless he has seen the original: and it does not appear to me necessarily to follow, that an inspector of franks has peculiar means of ascertaining imitated hand-writing. I think, at all events, this evidence was properly rejected, sufficient ground not having been previously laid for receiving it. But still, even if it was receivable, I am satisfied that, on the ground stated by my Lord Chief Justice, this rule ought to be discharged.

Rule discharged

FAREBROTHER *v.* SIMMONS.—p. 333.

The agent contemplated by the 17th sec. of the statute of frauds, who is to bind a defendant by his signature, must be a third person, and not the other contracting party; and therefore, where an auctioneer wrote down the defendant's name by his authority, opposite to the lot purchased: *Held*, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the statute.

ASSUMPSIT by the plaintiff, an auctioneer, against the defendant, for not taking or clearing away or paying the purchase money, being 34*l.* for a lot of turnips, standing and being on certain land. Second count, for crops of turnips bargained and sold, &c., and the usual money counts. Plea, general issue. At the trial before Wood, B., at the last assizes for the county of Surry, the only question was, whether there was a sufficient contract in writing to satisfy the statute of frauds. It appeared that the contract given in evidence was the book in which the plaintiff himself had written down the different biddings opposite to the lots, and which book had been duly stamped. The learned Judge directed a verdict for the plaintiff, reserving to the defendant liberty to move to enter a nonsuit. *Marryat*, in last Michaelmas term, obtained a rule nisi for that purpose, and cited *Wright v. Dannah*, 2 Camp. 203.

Gurney and *Abraham* now showed cause. This was no interest in land; for the turnips having ceased to grow, the land merely was a warehouse for them. But even if this be not so, the book is sufficient to take the case out of the statute. For the plaintiff may be considered as the agent of both himself and the defendant for the purpose of reducing the contract into writing. The case of *Wright v. Dannah* is distinguishable. There the party who wrote the memorandum was the person who made the sale for his own benefit. Here it is the case of an auctioneer, who has no personal interest in the transaction.

ABBOTT, C. J. The most favourable way for the plaintiff is to treat the question as a case of goods sold and delivered; and then the goods being above the price of 10*l.* the case will fall within the 17th section of the statute of frauds, which requires some note or memorandum in writing of the bargain, to be made and signed by the parties to be charged by it, or their agents, thereunto lawfully authorized. Now, the question is, whether the writing down the defendant's name by the plaintiff, with the authority of the defendant, be in law a signing by the defendant's agent. In general, an auctioneer may be considered as the agent and witness of both parties. But the difficulty arises, in this case, from the auctioneer suing as one of the contracting parties. The case of *Wright v. Dannah* seems to me to be in point, and fortifies the conclusion at which I have arrived, viz: that the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party upon the record.

Rule absolute.

BENSLEY and Another v. BIGNOLD.—p. 335.

A printer cannot recover for labour or materials used in printing any work, unless he affixes his name to it, pursuant to the 39 G. 3, c. 79, s. 27.

ACTION by the plaintiffs, who were printers, to recover the sum of 92*l.* 5*s.* for printing a pamphlet, entitled, "An Elucidation of the System of Fire and Life Insurance." Part of the charge was for printing and part for paper. At the trial before ABBOTT, C. J., at the London sittings after last Hilary term, the pamphlet was produced, and it purported to be printed by Pinnock and Maunder, 267, Strand, and not by the plaintiffs. It was objected on the part of the defendant, that the plaintiffs could not recover, the 39 G. 3, c. 79, s. 27, having enacted, "That every person who shall print any paper or book whatsoever, which shall be meant or intended to be published or dispersed, whether the same shall be sold or given away, shall print upon the front of every such paper, if the same shall be printed on one side only, and upon the first and last leaves of every paper or book which shall consist of more than one leaf, in legible characters, his or her name, and the name of the city, town, parish, or place, and also the name (if any) of the square, street, lane, court, or place in which his or her dwelling-house or usual place of abode shall be; and every person who shall omit so to print his name and place of abode, on every such paper or book printed by him, and also every person who shall publish or disperse, or assist in publishing or dispersing, either gratis or for money, any printed paper or book, which shall have been printed after the expiration of forty days after the passing of this act, and on which the name and place of abode of the person printing the same shall not be printed as aforesaid, shall, for every copy of such paper so published or dispersed by him, forfeit and pay the sum of 20*l.*" It was contended, that the statute being imperative, the printer must print his name, &c., and that the case must be governed by the same principles as those which had been applied to other prohibitory statutes; and *Ribbans v. Crickett*, 1 Bos. & Pul. 264; *Lightfoot v. Tenant*, *ibid.* 551; *Law v. Hodson*, 2 Campb. 147; 11 East, 300, *S. C.* and *Langton v. Hughes*, 1 Maule & Selw. 593, were cited. The Lord Chief Justice directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi for that purpose having been obtained in last Easter term.

Scarlett and F. Pollock now showed cause.—The omission to insert the name of the printer on the pamphlet in question does not constitute such a breach of the law as will prevent the plaintiffs recovering in this action. It is a well established rule, that where an act creates a new offence, by prohibiting what was lawful before, and gives a specific remedy against such new offence, that remedy must be pursued. But if it be an offence at common law, an indictment is also maintainable. *Rex v. Robinson*, 2 Burr. 803. And where newly created offences are only prohibited by the general prohibitory clause of an act of parliament, an indictment will lie; but where there is a particu-

lar prohibitory clause, specifying only particular remedies, those remedies must be pursued. *Rex v. Wright*, 1 Burr. 544. The omission to insert the name of the printer was not an offence at common law. It was made so by a statute which contains no general prohibitory clause, but a particular clause, which is not prohibitory, specifying a particular remedy. It is not, therefore, an indictable offence; and, if not, it is not such a breach of a law as to operate as a bar to a demand otherwise just. It is true that, in *Marchant v. Evans*, 2 B. Moore, 14, the Court of Common Pleas decided that an action could not be maintained by a printer for printing and publishing a weekly periodical work, printed on stamped paper, and distributed as newspapers, unless the printer lodged his name at the stamp office in an affidavit, or had his name and place of abode printed on some part of the publication, as required by the 38 G. 3, c. 78, s. 1. In that statute, however, there was a distinct prohibitory clause, without any specific penalty, and a separate clause with a penalty annexed. In the 39 G. 3, there is no prohibitory clause whatever, but merely a particular regulating clause, protected by a specific penalty. That case, therefore, confirms the distinction which has been laid down in many former cases, between a prohibition and a penal enactment. The cases cited at the trial are inapplicable to the present. *Law v. Hodgson* was decided on the ground of fraud, and the other three cases cited were cases of actual prohibition. In *Sullivan v. Greaves*, Park on Insurance, 8, *Gallini v. Laborie*, 5 T. R. 242, *Steers v. Lashley*, 6 T. R. 61, *Brown v. Turner*, 7 T. R. 630, *Camden v. Anderson*, 1 Bos. & Pul. 272, *Mitchell v. Cockburn*, 2 H. Bl. 379, *Booth v. Hodgson*, 6 T. R. 405, *Aubert v. Maze*, 2 Bos. & Pul. 371, *Buck v. Buck*, 1 Campb. 550, *Lofhouse v. Wharton*, 2 Campb. 221, *Parkin v. Dick*, 3 Taunt. 6, *Webb v. Brook*, 2 B. Moore, 14, *Marchant v. Evans*, 3 Barn. & A. 179, and *Cannan v. Bryce*, either an indictment might have been supported at common law, or the statute in each particular case contained distinct words of prohibition, or such as rendered the contract null and void ab initio. The cases of *Tenant v. Elliott*, 1 Bos. & Pull. 3, *Farmer v. Russell*, 1 Bos. & Pul. 296, *Robinson v. Bland*, 2 Burr. 1077, *Faikney v. Reynous*, 4 Burr. 2069, and *Petrie v. Hannay*, 3 T. R. 419, are authorities to show that a defendant is not allowed upon all occasions to avail himself of illegality as a protection against a just demand, even in transactions in contravention of the policy of particular statutes. In *Gremare v. Le Clerc Bois Valon*, 2 Campb. 144, it was held, that a person not licensed as a surgeon, according to the 3 Hen. 8, c. 11, may recover for business done on a quantum meruit, the act not being prohibitory, but merely penal. The words of the act are, "no person shall take upon himself to exercise physick or surgery. &c., without license, under penalty of 5*l.* per month." In *Hodgson v. Temple*, 5 Taunt. 181, it was held, that a person selling spirits to a retail dealer, who is also a distiller, which union of trade is prohibited by the 26 G. 3, c. 78, s. 54, may recover, although he knew that the spirits were to be used in the distillery; and in *Johnson v. Hudson*, 11 East, 180, it was held, that an unlicensed dealer in tobacco might

recover in an action for tobacco sold and delivered, notwithstanding the statute 29 Geo. 3, c. 68, s. 70, which enacts that every person who shall deal in tobacco shall, before he shall deal therein, take out a license, and by s. 7, this license was to be renewed yearly, under a penalty of 50*l*. The ground of the decision in that case was, that there was no clause whatever making the contract illegal, but that, at most, it was a mere breach of a revenue regulation, which was protected by a specific remedy. The three cases last cited are strong authorities in favour of the plaintiff's right to recover in this action: besides, in this case, a great part of the plaintiffs' demand arises in respect of the paper provided by them for printing, and for that, at all events, they are entitled to recover.

Guerney, contra, was stopped by the Court.

ABBOTT, C. J. I am of opinion, that the rule for entering a nonsuit must be made absolute. Where a statute directs a particular thing to be done, it must be done. And if there be an omission to do the thing required, it is not an excuse that the party did not intend to commit a fraud. This is a rule generally acted upon in the exchequer, in cases arising out of the breach of the revenue laws, by which particular things are directed to be done or omitted. The object of the 39 G. 3, c. 79, manifestly was to ascertain, first, who the printer of every publication is; and second, through him to ascertain the author. The 27 sec. of that statute requires, that every person who shall print any paper or book, shall print upon the first and last leaves of such paper or book his or her name, (not the name of any employer,) and the name of his or her place of residence. The statute therefore contains a positive direction, that the name shall be so printed. Here, that has not been done, and the omission to print the name was a direct violation of the statute. And I am of opinion, that a party cannot be permitted to sue either for work and labour done, or for materials provided, where the whole combined forms one entire subject matter, made in direct violation of the provisions of an act of parliament. The rule for entering a nonsuit must therefore be made absolute.

BAYLEY, J. The 39 G. 3, c. 79, establishes several regulations for public purposes. It requires that certain acts shall be done, and makes it penal for any person to neglect to do those acts. The omission to do them is a direct violation of the law: and a party cannot be permitted, in a court of law, to recover for work and labour done in direct violation of the law. Where a provision is enacted for public purposes, I think that it makes no difference whether the thing be prohibited absolutely or only under a penalty. The public have an interest that the thing shall not be done, and the objection in this case must prevail, not for the sake of the defendant, but for that of the public.

HOLROD, J. The principle applicable to the present case, is fully established by many decided authorities. There does not appear to me to be any sound distinction between those cases where a statute requires a thing to be done, and where it prohibits it from being done. Here the act requires the printer's name to appear on the book, which is in effect the same, as if it prohibited him from printing any work

without affixing his name to it. Supposing, however, that there is a distinction between those cases where a thing is prohibited generally, and where it is prohibited only under a penalty, in this case it is not merely prohibited under a penalty, for here the act expressly requires, that the printer's name shall be printed, which is the same thing as if it had expressly prohibited him from printing a work without doing so. The rule therefore must be absolute.

BEST, J. The distinction between *mala prohibita* and *mala in se* has been long since exploded. It was not founded upon any sound principle, for it is equally unfit, that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing be prohibited, because it is against good morals, or whether it be prohibited, because it is against the interest of the state. The object of the 39 G. 3, was to provide the most effectual means of discovering the authors of every publication, in order that they might be made answerable for the contents, and for that purpose, it has directed, that all the parties concerned in bringing the publication into the world, whether printers or publishers, shall be made known. Here, the printer's name has not been printed upon the publication as required by the act of parliament, and that being so, there is no legal contract on which an action can be founded, inasmuch as the thing was done in direct violation of the law. The case of *Marchant v. Evans* is precisely in point. I am of opinion, therefore, that this pamphlet having been sent out without the name of the printer, he cannot recover for the labour, or for the materials used in printing it. The rule therefore must be made absolute.

Rule absolute.

SLEAT and Others v. FAGG.—p. 342.

A parcel containing country bankers' notes, of the value of 1300*l.*, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail-coach, and was accepted by him to be so carried. The parcel was sent by a different coach, and was lost. The carriers had previously given notice that they would not be answerable for any parcel above 5*l.* in value if lost or damaged, unless an insurance were paid. No insurance having been paid in this case: *Held*, notwithstanding, that the carrier was responsible for the loss.

DECLARATION stated, that in consideration that the plaintiffs, at the request of the defendant, had caused to be delivered to the defendant a parcel, containing promissory notes for payment of money, country bank notes, and other notes, of the value of 3000*l.*, and certain promissory notes by the plaintiffs, for the payment of money on demand to the bearer thereof, to be forwarded by defendant for plaintiffs, towards Christ church, in the county of Hants, for a certain reward to defendant in that behalf; defendant undertook to forward such parcel towards Christ church, by a certain coach called The Pool Mail. Breach, that defendant did not forward the parcel by the Pool mail, but, on the contrary, caused the parcel to be sent by a certain other coach, whereby

the parcel and contents were lost to plaintiff. Plea, non-assumpsit. At the trial, before ABBOTT, C. J., at the London sittings after last Hilary term, the following appeared to be the facts of the case. The plaintiffs were bankers, resident at Christ church, in the county of Hants, and issued promissory notes, payable at their agents' in London, Messrs. Rogers, Towgood and Co. The latter, for a considerable time, had been in the habit of sending, on the first day of every month, a parcel, containing a large quantity of notes, paid by them on account of the plaintiffs during the preceding month, addressed to Mr. Angier, Christ church, Hants, he then being the head clerk in the plaintiffs' banking-house. These parcels were sent to the office of the defendant, at the Bell and Crown, Holborn, for the purpose of being forwarded by them to Christ church by the Pool mail, and were not insured as parcels of value. On the 1st December, 1820, Rogers, Towgood and Co., delivered at the office of the defendant in Holborn, a brown paper parcel, containing notes of the plaintiffs, to the amount of 1300*l*. It was addressed to "R. Angier, Christ church, Hants, per mail," and the defendant's book-keeper booked it to go by the mail. It was in fact sent by a Southampton light coach, which went from the same office at half past four in the evening. It was the practice at the office to send all parcels addressed to Christ church, which arrived at the office before that hour, by the light coach, and the defendant had so sent, for several preceding months, the parcels which had been addressed to Mr. Angier, and which had been directed to go by the mail. The Southampton light coach left the inn in Holborn at half past four; it stopped for supper and other purposes on the road; and at Southampton the parcels are taken out to be ready when the mail arrives. The mail leaves the Bell and Crown in Holborn at half past seven in the evening, and arrives at Southampton about twenty minutes after the light coach, and then any parcels coming by the other coach, addressed to Christ church, are put into the mail, and forwarded to Ringwood, where such parcels are then put into a mail-cart, and conveyed to Christ church. Neither of these coaches went the whole way from London to Christ church. The price of the carriage of such parcels was the same by both coaches. It appeared that the defendant had given notice that he would not be answerable for any article exceeding 5*l*. value, if lost, stolen, or damaged, unless the article were insured; and the plaintiffs were cognizant of that notice. Where an article was insured as a parcel of value, it was the practice in the defendant's office to place it while there in an iron chest, and upon loading the coach, to place it in the boot of the coach, with the heavy luggage over it, so as that it could not be taken out without removing the superincumbent articles. The parcel in question not having been insured as a parcel of value, was placed under the seat in the inside of the coach, and was lost. The defendant's book-keeper stated that he had always supposed the parcels sent to the plaintiffs to contain some monthly publication. On that day on which the parcel in question was lost, a person who booked himself late in the evening, in the name of Jones, for Southampton, as an inside passenger, and who was present when the coach was loading, and heard the names of the persons to whom the

different parcels were addressed called over, went by the coach as far as Farnham, saying, that he meant to sleep there, but, upon inquiry, no information could afterwards be obtained there respecting him, and there was very little doubt that he was the person who had stolen the parcel. On the following morning, some of the notes, to the amount of 1050*l.*, were presented for payment at Messrs. Rogers, Towgood and Co. and paid. The defendant, W. G. Rogers and C. Blayney were the proprietors of the Pool mail; the defendant and two other different persons were the proprietors of the Southampton light coach. Upon these facts the Lord Chief Justice was of opinion, that if there had been a mail-coach travelling the whole way from London to Christ-church, the plaintiffs would have been entitled to recover; but the fact being otherwise, he left it to the jury to consider whether the risk was increased by sending the parcel by the light coach instead of the mail; telling them, if they were of opinion that the risk of the loss was increased by sending the parcel by the substituted mode of conveyance, they should then find their verdict for the plaintiffs. A verdict was found for the plaintiffs for 1050*l.* A rule nisi having been obtained in last Michaelmas term for a new trial, on the ground that the carrier was in this case protected by the terms of his notice, the parcel not having been insured.

Scarlett, Marryat, and F. Pollock, now showed cause. The defendant is not protected by his notice; for this is a case not of negligence in the course of the performing contract, but of non-performance of the contract. The defendant contracted to send by one coach, and in fact he sent by another. If a purchaser of goods directs the vendor to send them by a particular ship, and he sends them by another, and they are lost, the vendor would clearly be responsible. Here too, the jury have found that the risk was increased by the defendant having sent the parcel by the light coach instead of the mail. The want of notice to the carrier of the value of the parcel, might possibly have been an answer to this action, if the parcel had been sent by the Pool Mail, and lost in the course of conveyance.

Littledale and Parke, contra. No notice having been given to the defendant of the value of the parcel, he is discharged from liability by the stipulation in his notice, that he will not be answerable for any goods above a certain value unless insured. In *Batson v. Donovan*, 4 B. & A. 21, it was held, that any unfair concealment of the value of the parcel by the party sending it discharges the carrier, and BAYLEY, J., there says, "that the holding out as an ordinary risk, what is really an extraordinary one, is a legal fraud." In this case, the notes were enclosed in a brown paper parcel, and addressed to a clerk of the plaintiffs, for the very purpose of concealing the nature of the contents from third persons, but the defendant was thereby also deceived, and was induced to consider it as a parcel of no value, and to place it in a part of the coach where parcels of little value are usually placed. It is true that the defendant undertook to carry this parcel by the Pool Mail, but that special undertaking cannot vary the consequences of any breach of the contract. The defendant enters into the contract to carry

by a particular conveyance, on the condition only, that the party shall deal fairly, and not commit any fraud. In *Batson v. Donovan*, there was a mere omission on the part of the plaintiff, to give the carrier notice of the value of the parcel; here there is an additional circumstance, the parcel is addressed to a clerk of the plaintiffs, for the very purpose of concealing the nature of its contents, and that was a fraud upon the defendant, and nullified the contract. In *Nicholson v. Willan*, 5 East, 507, the defendants, who were proprietors of a mail and heavy coach, contracted to send a parcel by the mail; it was booked for the heavy coach, and it was lost. They were held not to be liable for the loss.

ABBOTT, C. J. I am of opinion, that there is no ground for disturbing this verdict. I cannot say that the non-communication of the contents of the parcel to the carrier, and the directing of it to a clerk of the plaintiff for the purpose of concealing its contents, was such a fraud upon the carrier as to make his contract null and void. It has been held, indeed, that a plaintiff shall not be allowed to complain of a negligent performance of the contract by the carrier, where that negligence has been occasioned by the plaintiff's own act, viz.: by his treating the parcel as a thing of no value. This, however, is not the case of the negligent performance of the contract, but of a refusal altogether to perform it, for the defendant did not send the parcel by the Pool Mail, as he had contracted to do. This forms a material distinction between this case and that of *Batson v. Donovan*. Besides, in this case, the jury have expressly found, that by the substituted mode of conveyance, the property was exposed to greater risk than it would have been, had it been sent by the mode selected by the plaintiffs. For these reasons, I think that the rule for a new trial must be discharged.

BAYLEY, J. In *Batson v. Donovan*, the very ground of action against the carriers was a negligent performance of their duty, and it was held, that the plaintiff in that case could not make that negligence a ground of action, because he had superinduced it by his own neglect, in not communicating the value of the parcel to the defendants. If that had been done, they would probably have placed it in a more secure part of the coach. In that case, the carriers in performance of their contract placed the parcel in the coach, and the foundation of the charge against them was mere negligence in the course of performing their contract. This is a case not merely of negligence, but of misfeasance; for the defendant received the parcel for the purpose of conveying it by the Pool Mail, of which he was a proprietor. He, however, divests himself of his charge, and sends it by another conveyance, of which all the same persons were not proprietors. The defendant, therefore, did not carry it in pursuance of his contract, but substituted a different carrier, and that being so, this case is governed by the decision of the Court in *Garnett v. Willan*, ante, 53. If the defendant had sent the parcel by the mail, in pursuance of his contract, I should have been of opinion, that under the circumstances of the case, he would not have been liable for the loss. But having sent it by a differ-

ent mode of conveyance, I am of opinion that he is liable and consequently, that this rule must be discharged.

HOLKORD, J. I am also of opinion, that in this case there ought not to be a new trial. The question is, whether the carrier is protected from the loss in question by the terms of his notice. I think, that in cases of misfeazance a carrier is not thereby exempted from loss. This is clearly a case of misfeazance. It is not mere neglect in the course of performing the contract, but an absolute refusal by the defendant to execute the engagement entered into by him; for here he contracted to send by one conveyance, the proprietors of which would be responsible in case of loss, and he sends by another owned by different proprietors. This, therefore, is not a mere breach in the mode of performance, but is in direct contravention of his contract, and therefore a direct misfeazance. The plaintiffs in this case might have declared, that they having delivered to the defendant a parcel for a particular purpose, he, by a direct misfeazance, converted it to a different purpose, and a count in trover might have been joined. I entertained some doubts in the course of the argument, whether assumpsit was the proper form of action, on the ground, that the concealment from the defendant the value of the parcel, might be considered such a fraud on the part of the plaintiffs, as to annul the contract altogether, and then the party must have had recourse to his remedy for the misfeazance. But, upon further consideration, I am of opinion, that the contract was not rendered wholly void by that act of the plaintiffs. For it appeared, that the defendant would have sent the parcel by the same coach, even if the plaintiffs had described it as a parcel of value, inasmuch as all parcels sent to the office before a certain hour, were forwarded by that coach: and, therefore, the concealment of the value was not the cause of the non-performance of the contract, in which respect this case is distinguishable from *Batson v. Donovan*. There, the foundation of the action was, the negligence of the carriers in the course of performing the contract; here, the ground of action is an absolute refusal to perform the contract. For these reasons, I am of opinion, that the plaintiffs in this case are entitled to recover, and that the rule for a new trial must be discharged.

BEST, J. I had the misfortune to differ from the rest of the Court in *Batson v. Donovan*, and the opinion I delivered in that case continues unaltered. The only circumstance from which fraud is attempted to be inferred in this case, is, that the parcel was directed to Mr. Angier, (who was not the owner,) in order that it might not be known to be a banker's parcel. That, however, is not a circumstance which affords such evidence of fraud as to avoid the contract; there must be a positive fraud. Here there is a mere concealment, which does not amount to fraud. For these reasons, I am of opinion, that the plaintiffs are entitled to recover, and that the rule for a new trial must be discharged.

Rule discharged.

WRIGHT v. SNELL and Others.—p. 350.

A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners. Goods having been sent by the carrier addressed to the order of J. S., a mere factor: *Held*, that the carrier had not, as against the real owner, any lien for the balance due from J. S. Query, whether, if the notice had been, that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from J. S.?

ASSUMPSIT for money had and received. Plea, general issue. At the trial, at the London sittings after Michaelmas term, 1820, the jury found a verdict for the plaintiff for 58*l.*, subject to the opinion of the Court, on the following case:

The plaintiff, a manufacturer of earthenware in Staffordshire, had forwarded by the defendants, who were carriers from thence to London, 30 crates of earthenware, on 20th May, 1820, and 20 crates on the 9th July, 1820, addressed to the order of E. Robinson, who had no interest in the goods, except as commission-agent. The charge due for carriage on the two parcels amounted to 56*l.* 1*s.* 4*d.* Robinson was a person who acted as agent in London to procure orders for goods from the plaintiff and other manufacturers in Staffordshire. On the 20th May, he was indebted to the defendants in the sum of 58*l.* for the carriage of other goods, no part of which belonged to the plaintiff. The plaintiff having applied to the defendants to deliver the goods in London, the latter refused to do so, without an order in writing from Robinson, and without being paid the whole balance due to them from Robinson, including the above sum of 58*l.*; and the plaintiffs, in order to obtain possession of the goods, agreed, under protest, to permit the defendants to receive the sum of 107*l.*, being the price to be paid for the goods by the purchasers in London. The defendants, accordingly, received that sum; and, after deducting the sum of 56*l.* 1*s.* 4*d.*, which was not disputed, and also the sum of 58*l.*, upon which the question arose, paid over the balance, amounting to 92*l.* 8*s.* to the plaintiffs. It appeared that, between September, 1819, and February, 1821, the defendants had delivered to the plaintiffs a printed freight-bill, in which they stated "that all goods would be considered subject to a lien, not only for the freight of such particular goods, but also for any general balance due from their respective owners," and subsequently to the present dispute, the defendants delivered to the plaintiff other freight-bills, by which they stipulated "that all goods, from whomsoever received, or to whomsoever belonging, should be subject to a lien, not only for the freight of the particular goods, but also for any general balance that may be due from the person to whom they are consigned or addressed."

Campbell, for the plaintiff, was stopped by the Court.

Chitty, for the defendants. By the terms of the freight note, "all goods are to be considered subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their

respective owners." The goods here were consigned to Robinson's order; he therefore, although in reality a factor, had the apparent ownership with the consent of the true owner. Now, if an agent be permitted to deal as if he were a principal, the party dealing with him, and ignorant of his representative character, is entitled to the same right against him as if he were in fact the principal. Thus he may set off against a demand from the principal, a debt due from the factor to himself. *George v. Claggett*, 7 T. R. 359.

ABBOTT, C. J. Where goods are consigned to A. B. or order, the carrier has a right to consider A. B. as the owner of the goods for the purpose of delivery, but not for the collateral purpose of creating a lien on the goods, as against the owner, in respect of a general balance due from the consignee; nor will any prejudice arise to the carrier from our holding this to be the law, for he need not deliver the goods in any case till the price of the carriage for them is paid. I think, therefore, that in this case, the defendants had no lien for the sum of 58*l.*, and that the plaintiff is entitled to our judgment.

BAYLEY, J. The foundation of the lien claimed, is that the carriers had given notice that all goods should be considered subject to a lien, not only for the freight of the particular goods, but also for any general balance due from the respective owners. Now, perhaps, as between the real owner of the goods and the carriers, that may be a binding bargain; the real owner, however, in this case, is not Robinson, the consignee, from whom the debt is due to the defendants, but the plaintiff, who is a perfect stranger to that debt. It has been argued, that the carrier was induced to believe Robinson to be the real owner by the act of the plaintiff, who had consigned the goods to the order of Robinson. In the ordinary course of trade, however, goods are consigned to a man, either on his own account, or in the character of factor. There was nothing in the manner in which these goods were consigned to Robinson, to induce the carrier to believe that they were consigned to him on his own account, and as his own property, rather than in his character of factor; and if they were consigned to him in that character, it would be most unjust to allow the carrier this lien. For it would follow, that if goods to the amount of 5000*l.*, the carriage of which amounted to 10*l.* only, be sent to a factor, he at that time being indebted to the carrier in 1000*l.*, the latter would have a right to keep those goods until he were paid the whole sum due to him from the factor. That would, however, be most unjust, and, in my opinion, contrary to law.

HOLROYD, J. I am of opinion, that the mere act of consigning goods to another, cannot give to a third person any right to retain the goods of the consignor until the payment of the debt of the consignee. The case of *George v. Claggett*, differs materially from the present; there the goods were consigned to a factor, who carried on business also on his own account, and he sold, acting under the authority given to him, but in his own name; and it was held that the purchaser of the goods had a right to set off, in an action brought by the principal, the debt due from the factor. It is clear, that the mere possession of

the factor does not give him a title to deal with the goods beyond the authority given to him: he may sell, but he cannot pledge. Now, if he could not pledge these goods to the carrier, as a security for his debt, by any subsequent agreement, how can he do it in this case, in consequence of any prior express or implied agreement? I am of opinion that he cannot, by any agreement, either express or implied, from his course of dealing, subject the property of his consignor and employer to the payment of his own debts: nor can he authorize these defendants to retain the goods as a pledge and security for the money owing by him.

BEST, J. I am of the same opinion. The cases in which a party, dealing with a factor who does not, at the time of sale, disclose the name of his principal, has been allowed to set off a debt due to him from the factor, in an action brought by the principal, do not apply to the present question. Those cases proceeded on the ground, that the owner of the goods had allowed the factor to assume the character of owner, and thereby induced others to advance him money. That doctrine has no application in this case, because carriers are not in the habit of advancing money to the consignees of goods. They have it in their power to exact payment upon their delivery. But even supposing that these goods, instead of being addressed to a factor, had been addressed to the real purchaser, the carrier would have no right to say, if the bargain was rescinded, either from the inability of the purchaser to pay, or his refusal to complete the bargain, that the original owner of the goods should not have them back without paying all that might be due from the proposed vendee. I should doubt if any form of words would be sufficient to establish a liability of that sort. It is, however, sufficient, in this case, to say, that the plaintiff is the owner of the goods, and there being nothing due from him to the carriers, the words of the notice do not impose any liability upon him. If any question should arise that falls within the terms of the notice last given, it would be very fit to consider whether a carrier can make so unjust a regulation as is there attempted. For the reasons already given, I am of opinion that the plaintiff is entitled to the judgment of the Court.

Judgment for the plaintiff

MAINWARING, Baronet, v. GILES.—p. 356.

An action at common law will not lie for disturbing another in the possession of a pew, unless the pew be annexed to the house in the parish.

DECLARATION stated, that the plaintiff, before and at the time, &c., was and thence, until, &c., had been, and still was lawfully possessor of a certain messuage, with the appurtenances, situate in the parish of Rosthern, in the county palatine of Chester, and therein, during all the time aforesaid, inhabited, and still did inhabit with his family, and by reason thereof, until, &c., of right ought to have had, for himself and

his family inhabiting in the said messuage, with the appurtenances, the use and benefit of a certain pew in the parochial chapel of Over Peover, situate in the parish aforesaid, to hear and attend divine service celebrated therein, as the said messuage appertaining. And that defendant disturbed him in the enjoyment of the pew. Whereby, &c. In the second count, the plaintiff, after alleging his possession, &c., as in the first count, claimed the right, privilege, and liberty of sitting in the pew, as to the messuage belonging and appertaining yet, &c. The third count stated, that the said plaintiff, before at the time, &c., was and thence until, &c., continued, and still was lawfully possessed and entitled to the use and benefit of a certain other pew in a certain chapel, in the parish and county aforesaid, to hear and attend divine service celebrated therein, yet, &c. Plea the general issue. The cause was tried at the last Summer assizes for the county of Chester. The plaintiff gave in evidence an instrument under the seal of the chancellor of the diocese of Chester, by which, after reciting that there was a certain cause or business of assigning and conforming the taking down and rebuilding the chapel of Over Peover, in the county and diocese of Chester, with a gallery, and with convenient pews or seats, as well in the body of the said chapel, as in the said gallery; and that, at a vestry meeting held April 19th, 1812, pursuant to public notice, it was unanimously resolved by the persons present, that three individuals be appointed to allot and appropriate the several pews or seats in the body of the said chapel, and also in the gallery, to and amongst such of the inhabitants or land-owners within the said chapelry, who had, or should subscribe towards defraying the expenses of the said gallery and new pews; the bishop decreed a faculty commission and authority to the individuals so appointed by the vestry, and assigned and confirmed unto them, to allot and appropriate the several pews or seats in the body of the said chapel, and also in the said gallery, to and amongst such of the inhabitants or land-owners within the said chapelry, who had, or should subscribe towards defraying the expenses of the said gallery and new pews; the right and jurisdiction of the ordinary, nevertheless, in the said gallery, and also in the pews or seats therein, and the power to approve or disapprove of the future disposition thereof, as from time to time shall to him seem expedient, being at all times saved and reserved. The plaintiff then gave in evidence an award made by the three commissioners, in which one pew was allotted to the plaintiff, expressly in respect of the mansion-house in his own occupation, and four other pews, including the pew in question, were also allotted to the plaintiff, but without specifying any particular messuages, in respect of which they were so allotted. The plaintiff was proved to be the owner of other farms in the townships, in addition to the lands belonging to the mansion-house in which he resided. The disturbance of the right was fully proved, and the jury found a general verdict for the plaintiff, damages 10*l*.

D. F. Jones, in last Michaelmas term, obtained a rule nisi for a new trial, on the ground, that the document, as given in evidence, was in fact merely a commission for the purpose of informing the conscience

of the bishop, with a view to his subsequently granting different faculties for the several pews, and was not itself a faculty. This instrument only delegated a right to the commissioners of allotting conditionally the pews to different persons, reserving expressly the right of approval, and of subsequently disposing of the seats to the ordinary; now a faculty should at once have allotted to the plaintiff the pew in question.

But even supposing the document to be a faculty, it was invalid, for the allotments were to be in respect of subscriptions towards the repairs of the chapel, instead of being in respect of the inhabitancy of messuages within the township.* It should, also, to be valid, have specified the particular messuage to which the pew was annexed. *Rogers v. Brooks*, 1 T. R. 431. Nor could the award be coupled with it, for it did not appear that the bishop had ever approved of such award. Besides, even supposing it could be so coupled, still it did not allot the pew in respect of any particular messuage, of which the grantee was the inhabitant. *Stocks v. Booth*, 1 T. R. 428. In the third place the plaintiff ought to have proved, upon the trial, the fact of his being the occupier of a particular messuage, and to have connected the pew with that messuage. And he cited Watson's Clergyman's Law, p. 39, *May v. Gilbert*, 2 Bulst. 150, *Branbin v. Tradum*, Popham, 140, Gibson's Codex, 197, 8, *Kenrick v. Taylor*, 1 Wils. 326, *Griffith v. Matthews*, 5 T. R. 296, *Stocks v. Booth*, 1 T. R. 428, 1 Burn's Ecclesiastical Law, 333, *Corven's Case*, 12 Co. 105, *Langley v. Chute*, Sir T. Raym. 246.

Parke now showed cause. The original grantee of a pew under a faculty may maintain an action at common law for disturbance, although the pew be not in the grant annexed to a house. In *Pettman v. Bridger*, 1 Phillim. Rep. 324, it was held, that a possessory right in a pew was sufficient to maintain a suit in an ecclesiastical court against a mere disturber. Sir JOHN NICHOLL, in delivering the judgment of the Court in that case, says, "The fact of possession implies either the actual or virtual authority of those having power to place. The disturber must show that he has been placed there by this authority, or must justify his disturbance by showing a right paramount to the ordinary itself; namely, a faculty by which the ordinary has parted with the right; or if there be no proof of a faculty, there may be proof of prescription, and such immemorial usage as presumes the grant of a faculty. It is necessary, in case of prescription, to show, that the use and occupation of the seat have been from time immemorial appurtenant to a certain messuage." In this case the pew was allotted to the plaintiff in 1812, by the award made by virtue of the faculty. In Watson's Clergyman's Law, p. 298, it is said, "prescriptions to have seats, as belonging to houses, are not reasonable; for, first, it has been adjudged, that if an ordinary make a grant of a seat to one and his heirs, it is not good, and the reason given is, that a seat cannot belong to a person but to a house; for otherwise, when a person goes out of a town to dwell in another place, yet he shall retain the seat, which is unreasonable;" and *Brabin v. Tradum*, Popham, 140, & 2 Rolle's Abr. 287, n. 7, is cited. He then proceeds to say, "And if the ordinary may not make a grant of a seat to a person and his heirs, I see not

* 1 Burn. Eccles. Law. 360.

how he can make such grant to bind posterity, for he cannot make a grant to a house, not things but persons only being capable of grants;" and *Haines'* case, 12 Coke, 118, is cited. It appears, therefore, to have been the opinion of that learned writer, that the original grant of a pew could only be to a person, and not to a person in respect of a house. In *Kenrick v. Taylor*, 1 Wils. 326, it was held, in an action for disturbing the plaintiff in his pew, that it was not necessary, as against a stranger, to prove that he had repaired it. [BEST, J. In that case the pew was alleged to be annexed to the plaintiff's house, and, consequently, the disturbing of him in his enjoyment of his pew constituted a temporal injury in respect of an easement which he had in virtue of his house. It may be very fit that, for the purpose of preserving decency and decorum in places of worship, there should be a remedy in ecclesiastical courts for disturbance in such a case; but can any action be maintained at common law, except in respect of the temporal injury arising from the disturbance of a right to a pew where it is annexed to a house? ABBOTT, C. J. In no case has a person a right to the possession of a pew analogous to the right which he has to his house or land; for trespass would lie for an injury to the latter, but for an intrusion into the former, the remedy undoubtedly is by an action on the case. That furnishes strong reason for thinking that the action is maintainable only on the ground of the pew being annexed to the house as an easement, because an action on the case is the proper form of remedy for the disturbance of the enjoyment of any easement annexed to land, as in the case of a right of way or a stream of water.] The reason why trespass does not lie against a wrong doer for an injury done to the pew of another is, that the freehold is in the parson. A faculty for a pew can only be to the grantee, and the pew cannot be enjoyed in respect of a particular messuage. The ordinary has the disposal of the seats of the church, and he may from time to time apportion them according to the circumstances of the parish. In *Brownlow and Goldesbrough's Reports*, 45, it is laid down by Lord Coke, that a pew cannot belong to a house.

D. F. Jones, contra, was stopped by the Court.

ABBOTT, C. J. Without giving any opinion whether the instrument given in evidence be a valid instrument or not, I am of opinion, that this being a pew in the body of the church, and not in a chancel, which might be the freehold of an individual, no action at common law can be maintained for a disturbance, because the pew is not annexed to any house. The disturbance is matter for ecclesiastical censure only. The rule for a new trial must therefore be made absolute.

BAYLEY, J. I am of the same opinion. We leave the question untouched as to any right which the party may have in the ecclesiastical court. We only decide, that we cannot, in a court of common law, interfere in such a case as this, unless by the faculty the pew be annexed to a house in the parish.

HOLROYD, J. Where a right is annexed to a house in the parish, an obstruction to that right is a detriment to the occupation of the house, and I apprehend, that it is only on account of the pew being annexed

to a house, that the temporal courts can take cognizance of any intrusion into it. Inasmuch, therefore, as the pew is not in this case annexed to a house, this is as much a matter of ecclesiastical cognizance alone as the question which was discussed in this Court as to the right of burying the dead in iron coffins. I am of opinion, that the mere right to sit in a particular pew is not such a temporal right as that, in respect of it, an action at common law is maintainable

BEST, J., concurred.

Rule absolute.

JOHN DOE, on the Demise of CHARLES, Earl of SHREWSBURY, v. WILSON, Esq.—p. 363.

By a private act, passed in the year 1720, certain estates were settled in strict settlement, and a power was reserved to the respective tenants in tail, by deed, to lease any part of the lands thereby settled, "for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of three lives, so as upon every such lease there be reserved, and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, boons, and services for the same: and so as there be contained therein a condition of re-entry for non-payment of the said rent and rents thereby to be reserved." By lease dated the 6th January, 1785, a tenant in tail of the said estates demised a part of the premises thereby settled, to hold from the date of the lease for ninety-nine years, if three persons therein named should so long live, yielding and paying yearly and every year during the said term, unto the lessor, the yearly rent of 50*l.* upon the 25th March and 29th September, by even and equal portions, the first payment to be made on the 25th March ensuing the date of the lease. There was a proviso that, if the rent should not be paid on those days, or if certain amerciaments and fines therein mentioned, after reasonable demand, should not be paid, it should be lawful for the lessor, his heirs, and assigns, to re-enter and distrain, and the distress to take away, detain and keep, until the rent be satisfied; and there was the following proviso for re-entry: "that in case the said yearly rent should be unpaid for the space of twenty-eight days after it became due, being lawfully demanded, it should be lawful for the lessor, his heirs, and assigns, to re-enter."

Previous to the time of passing the act, the premises demised by this lease had been demised jointly with other premises by the settler's ancestor, by a lease bearing date 2d February, 1708, "for ninety-nine years, determinable upon three lives, at a yearly rent of 82*l.*, payable on the same days as those mentioned in the lease of the 6th January, 1785, and the first payment to commence on the 25th March ensuing the date of the lease." It contained, also, a similar power for the lessor to distrain, and a power of re-entry, upon the rent being behind for twenty-eight days, upon its being lawfully demanded, and not paid, and no sufficient distress being found upon the premises. It did not appear whether any other lease was granted between that period and the year 1756. At that time another lease of the premises, demised by the lease of the 6th January, 1785, was granted at a rent of 32*l.*, payable at the same period as in the other leases, containing the same powers of distress and re-entry and non-payment of rent, as those in the lease of the 6th January, 1785:

Held, first, that it was not a valid objection to the lease of the 6th January, 1785, that the rent was made payable on the 25th March and the 29th September, (although the term commenced on the 6th January, and therefore there was a forehand rent, which might prejudice the remainder-man) inasmuch as the rent was made payable on the same days by the former lease, and, therefore, this was the usual and accustomed rent:

Held, second, for the same reason, that it was no objection to the lease that the rent was made payable by half-yearly payments, although the power required it to be payable yearly; the word *yearly* meaning a payment of rent in the year:

Held, third, that it was no objection to the lease that by the terms of the landlord could distrain only after a reasonable demand, and that he was bound to detain the distress until the distress be satisfied; for this being a clause introduced for his benefit, he was not thereby

abridged of any right of distress which he had by common law, or of sale, under the statute 4 and 5 W. and M.:

Held, fourth, that it was no objection to this lease that the cause of re-entry reserved the right of entry to the landlord upon the rent being twenty-eight days in arrear, for this was a reasonable condition of re-entry, and was conformable to the old lease. Nor was it any objection that the right of re-entry was made to depend upon the rents being lawfully demanded, for the landlord was not thereby deprived of the benefit of the 4 G. 2, c. 28, and consequently was entitled by that statute to enter without making any demand:

Held, also, that part of premises formerly demised, jointly with others, at one entire rent, might be let under the terms of this power, at a rent bearing the same proportion to the old rent that the premises demised by the lease bore to the whole premises formerly demised.

EJECTMENT to recover lands in the county of Stafford. The cause was tried at the Summer Assizes, 1820, for the county of Stafford, before BEST, J., when the jury found a verdict for the lessor of the plaintiff, subject to the opinion of the Court, on the following case:

In the year A. D. 1720, a private act of parliament passed for annexing the Duke of Shrewsbury's estate to the earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement. By this act certain lands and hereditaments, of which the premises mentioned in the declaration were parcel, were settled to the use of George Talbot, brother of Gilbert, then Earl of Shrewsbury, for life, remainder to trustees to preserve, &c. And after the decease of the said George Talbot, to the use of trustees for the term of 200 years, to secure the jointure of Mary Fitzwilliam, his wife, and after the determination of the said term, to the use of the first and other sons of the said George Talbot, on the body of the said Mary Fitzwilliam to be begotten, in tail male successively, with remainders over, and with an ultimate remainder to the use of all persons being issue male of the body of John first Earl of Shrewsbury, to whom the title, honour and dignity, of Earl of Shrewsbury should, by virtue of the letters patent of the creation of the said earldom descend, in tail mail, to attend and wait upon the said earldom, and to be annexed to and descend with the same. The act contained a restriction from alienation, except on certain conditions therein specified, and the following power of leasing: "that it shall and may be lawful to and for the successive tenants in tail, and every other person and persons to whom the said manors, lands, &c., are limited by this act of parliament successively, by any deed or deeds, writing or writings by them respectively to be signed in the presence of two or more credible witnesses, to demise or lease all or any part or parts of the said manors, lands, &c., and premises, whereof the person making such lease shall be actually possessed, except the capital messuage, gardens, and park of Heathropp, in the county of Oxford, to any person or persons in possession, and not in reversion, for the term of three lives, or twenty-one years, or for any term or number of years, determinable upon the death or determination of three lives, *so as upon all and every such lease and leases, there be reserved and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, boons, and services for the same; and so as in every such lease there be contained a condition of re-entry for*

non-payment of the said rent and rents thereby to be reserved, and so as the lessee and lessees to whom such lease and leases shall be made, do seal and execute counterparts of such lease and leases." On the 6th day of January, 1785, George, then Earl of Shrewsbury, the eldest son and heir of the said George Talbot, by Mary Fitzwilliam, his wife, was seised in tail male of said settled estates, under the said act of parliament, and being so seised, signed and executed in the presence of two credible witnesses, an indenture of lease of that date, comprising the premises in the declaration mentioned, by which in consideration of the surrender and delivery up of one indenture of lease of the premises thereby demised, bearing date the 13th of January, 1756, granted by the said earl to Thomas Patten, for the lives of three persons therein mentioned, two of whom were since dead; and also in consideration of the sum of 105*l.*, paid by T. Patten, the lessee, for adding two lives, for and in the name of a fine or income, he the said earl demised, granted, leased, &c., set and to farm let unto the said T. Patten, all those wire-mills, new erections, and buildings, called or known by the name or names of Alton Mills, upon the river Churnett, &c., situate in Alton, in the county of Stafford, &c., to have and to hold, from the day of the date of the indenture, for the term of ninety-nine years, if three persons therein mentioned should so long live, yielding and paying, therefor, yearly, and every year, during the said term, thereby granted, unto the said earl, his heirs and assignus, the yearly rent or sum of 50*l.*, at and upon the two usual feast-days and terms in the year, called the feast-day of the annunciation of the blessed Virgin Mary, and the feast-day of St. Michael, the archangel, by even and equal portions, clear, over and above all manner of taxations, impositions, and payments, of what nature or kind soever, the first payment thereof to begin and to be made on the feast-day of the annunciation of the blessed Virgin Mary next ensuing the date thereof. There then followed covenants on the part of the lessee for payment of rent, and for repairing the premises, and converting the mills, which had formerly been used as water corn-mills, into the same condition as they were before they were converted into wire-mills, and for doing suit of court to the court holden for the manor of Alton, and to obey, perform, accomplish, and pay all ordinances, pains, fines, and amerciaments, made and set from time to time in the said court, by the stewards, homages, or affeerors there; and that in case the mills, &c., or kiln-house, &c., should remain out of reparation three months after warning or notice, &c., or if the said suit of court should not be done, then the lessee should pay to the lessor for every such time the premises were out of reparation for the space of three months, the sum of 20*s.* sterling, nomine pœnæ; and for every time as the said suit of court should not be done, the sum of 20*s.* in nomine pœnæ. The lease then contained the following power of distress and proviso for re-entry: "And if it shall happen the said yearly rent shall not be paid at the days and times aforesaid, or if the said amerciaments, pains, fines and penalties, nomine pœnæ, after reasonable demand in that respect made, be not paid and satisfied, according to the true intent and meaning of this indenture, then from time to time it shall and may be lawful to and for the

said Earl, his heirs and assigns, into the said demised premises, to re-enter and distrain, and the distress and distresses to take, lead, drive, and carry away, detain, and keep, until they or some of them be fully satisfied, contented, and paid. Provided always then, that in case it shall happen the said yearly rent, or any part thereof, shall be behind or unpaid by the space of twenty-eight days next after any or either of the respective feast-days and times whereon the same ought to be paid, as aforesaid, *being lawfully demanded*, that it shall be lawful to and for the said Earl, his heirs and assigns, into all and singular the said demised premises, or into any part thereof, in the name of the whole, wholly to re-enter, and the same to have again, re-possess, and re-enjoy, as in his and their former estate; any thing herein contained to the contrary thereof in anywise notwithstanding." Covenant by the lessor for quiet enjoyment, &c.

The premises mentioned in the declaration and demised by the above lease were, with other premises, demised by a former indenture of ease, dated February 2d, 1708, by the Duke of Shrewsbury, in consideration of a sum of 200*l.*, habendum to the lessee from the date thereof, for ninety-nine years, if three persons therein named should so long live, yielding and paying therefore, yearly and in every year, during the said term thereby letten, unto the duke, his heirs and assigns, the yearly rent of 82*l.*, at the two usual feast-days of the year, called the feast-day of the annunciation of the blessed Virgin Mary, and the feast of St. Michael, the archangel, by even and equal portions, clear, over, and above all manner of taxations, impositions, and payment whatsoever, the first payment to be made on the 25th March then next ensuing. The lease contained covenants similar to those in the lease of 1785, for the payment of rent, repairs, &c., and to do suit of court, &c., and to pay all fines and amerciaments made from time to time in the court: and that if the premises should be out of reparation for three months after notice, or if the suit of court should not be done, that the lessee should pay, for every time the premises were so unrepaired for the space of three months, the sum of 20*s.*, in nomine pœnæ, and for every time the suit of court shall not be done, the sum of 10*s.*, in nomine pœnæ. There then followed a power to distrain in precisely the same terms as those used in the lease of 1785. The proviso for re-entry differed from that in the lease of 1785, in this respect, that the right to re-enter was made to depend "upon the rent being in arrear for the space of twenty-eight days, and upon its being lawfully demanded and not paid, *and no sufficient distress being found* upon the premises whereby the rent might be satisfied." There was reserved a liberty to the lessee to exchange lives, and a stipulation, as to what was to be done, if the lives should drop in the first ten years.

The indenture of lease of the 13th January, 1756, (mentioned in that of the 6th of January, 1785,) granted by George, Earl of Shrewsbury to Thomas Patten, of the same premises as were demised by the indenture of lease of the 6th January, 1785, and on the surrender and delivery up of which the lease of the 6th January, 1785, was executed by the said George, then Earl of Shrewsbury, was granted in consideration of a certain fine therein mentioned, and reserved an annual

rent of 32*l.* 10*s.*, payable at Lady-day and Michaelmas in every year, in like manner as the leases of the 2d February, 1708, and the 6th January, 1785, and contained the same powers of distress and re-entry for the non-payment of rent as the said lease of the 6th January, 1785, contained. None of the other leases of the premises, (if any,) nor any counterpart or copies, of such leases, had been preserved. T. Patten, the lessee to whom the lease of the 6th of January, 1785, was made, upon the making thereof, sealed and executed a counterpart of such lease. George, Earl of Shrewsbury, died on the 21st of July, 1787; Charles, Earl of Shrewsbury, the lessor of the plaintiff, was the heir male of Charles Talbot and Mary Fitzwilliam, who were his grandfather and grand-mother, and succeeded to the said earldom, and the settled estates, on the death of George, Earl of Shrewsbury. The defendant, at the commencement of this action, was in possession of the premises in the declaration mentioned, and claimed to be entitled to hold the same under the lease of the 6th January, 1785. The defendant was served with a regular half-year's notice to quit the premises, which notice expired before the day of the demise laid in the declaration.

Campbell for the plaintiff. The question is, whether the lease granted by George Earl of Shrewsbury was a valid execution of the leasing power contained in the act of parliament. That power must be construed according to the intention of the settlor. His great object seems to have been, that there should always be an adequate fortune to support the title. The first objection to the lease is, that it reserves a forehand rent, and therefore is in fraud of the power. The lease is dated the 6th of January, 1785, habendum from the date of the lease, with the reservation of 50*l.* rent, payable half-yearly on the 25th of March and the 29th of September, the first payment to be made on the 25th March following the date of the lease. Now, the power expressly requires, that there shall be made payable yearly, during the continuance of the lease, the usual and accustomed yearly rents. This rent is not payable during the continuance of the lease, for rent is part of the produce of the land, and can only be payable in respect of the occupation of the premises. If anything is to be paid before the occupation, it is not rent, but rather in the nature of a fine; here the first payment being to take place on the 25th March, six months' rent is payable for an occupation of two months and nineteen days, and at the end of the term there will be three months and seven days, for which no rent will be payable, because the last rent is payable on the 29th September. This may materially injure the remainder-man, for if the title were to descend upon him on the 30th September in the last year of the term, he would not be entitled to any rent or any advantage from the land between that day and the expiration of the term on the 6th January following. It is therefore a violation of the power, for the rent is not payable during the continuance of the lease. If this be a good execution of the power, the whole of the settled property might be leased, reserving the year's rent the first day of the year, and the remainder-man might be a year short of one day without anything to support the title. In *Regina v. Weston*, 2 *Ld.*

Raymond, 1198, it is said by POWELL, J., that if a man has a power to make leases, reserving the ancient yearly rent annually, yet if it was reserved upon a day before the year was up, as if the year ended at Christmas, and it was reserved at Michaelmas, it would be well, pursuant to the power, to which HOLT, C. J., is reported to have agreed. That, however, was a mere obiter dictum in a sessions' case, and is not an authority entitled to any great weight. In Sugden on Powers, 609, and 613, this subject is discussed, and the case of *Doe dem. Wilmot v. Giffard* is cited in support of the contrary doctrine. It appears from the brief held by the late Sir *Vicary Gibbs*, then Attorney-General, that that was an ejectment brought to recover possession of Lansdowne-house, and tried before Lord ELLENBOROUGH, C. J., at the Middlesex sittings after Hilary term, 1810. The question was, whether a lease for twenty-one years, granted by the late Marquis of Lansdowne, of the premises in question to Miss Giffard was valid. The premises had been settled to various uses by a deed which contained the following power of leasing: "That it shall be lawful for the Marquis of Lansdowne (the maker of the power), the Earl of Wycombe and Lord Henry Petty respectively, when, and as they shall be severally in possession of the aforesaid lands, premises, &c., by indenture, &c., to demise, lease, or grant any part of the lands and premises hereinbefore granted, of which they shall respectively be in possession, for any term or number of years absolutely not exceeding twenty-one years, so as such leases respectively be made to take effect in possession, and not in reversion; and so as there be reserved, in and by such leases, demises, or grants respectively, *the best and most improved yearly rent*, to be incident to the reversion of the said premises, that can be reasonably had or gotten for the same, without any fine, premium, or foregift, or anything in the nature of a fine being made or taken thereof." The lease was dated the 14th September, 1809, and it was made by the Earl of Wycombe, then Marquis of Lansdowne, of the one part, and Miss Giffard of the other, and the premises in question were demised to Miss Giffard for the term of twenty-one years *from the day of the date* of the lease, at a rent of 1200*l.*, payable by two even half-yearly payments, on the 29th day of September and the 25th day of March in every year during the continuance of the demise, the first payment to be made on the 25th day of March then next. An objection was made, that inasmuch as the rent was made payable on the 25th March and the 29th September, and the term of the lease would expire on the 14th September, there would be no rent payable under it from the 25th March preceding the expiration of the term; and on that ground Lord ELLENBOROUGH, C. J., was of opinion, that the lease was void, and the lessor of the plaintiff recovered. In fact, there the remainder-man was prejudiced, for if his title accrued on the 26th March, a period from that day to the 14th September would elapse in which no rent would be payable. No sound distinction can be taken between that case and the present, for in this case there is a similar period, from the 29th September to the 6th January, during which no rent would be payable. *Isherwood v. Oldknow*, 3 M. & S. 382, is distinguishable from this, because there

the habendum was from a prior period, and the payment of rent was co-extensive with the lease, and the judgment of Lord ELLENBOROUGH proceeds on the ground, that the remainder-man could not by any possibility be deprived of any portion of his interest. The old leases set out in the case cannot vary the construction of the power, for, according to the law as laid down in *Iggulden v. May*, 7 East, 237, extraneous evidence cannot be received to explain a power which is not ambiguous. At all events, there is no reference in the power except to pre-existing leases; there is no reference to any act to be done after the making of the power, and it is clear, that no inference therefore can be drawn from the lease by George E. of Shrewsbury in 1756, the settlement under the act of parliament having taken place in 1720. The lease of 1708 can be admitted only for the purpose of seeing what the premises were, and what was the ancient and accustomed rent, but not for the purpose of looking at the reservation of the rent, because there is nothing equivocal in the words of the power upon that subject. In *Smith v. Doe dem. The E. of Jersey*, 2 Brod. & B. 473, in error, leases in existence at the time the power was created, were held to be admissible for the purpose of showing how the rent was to be reserved, or rather to show what was a reasonable power of re-entry. The question in that case was, whether the rents were equally beneficial, and, in order to ascertain that, the former leases were received to show what construction was to be put upon the words in the power, "so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved;" and they were held to be admissible, on the ground that there was an ambiguity in the power. Here there is no ambiguity whatever in the words of the power. There too, the lease was granted by the maker of the power, but that is not so in this case. The former leases, indeed, cannot afford any inference, that the maker of the power or the legislature meant that the future leases should reserve a rent in the same manner, and payable at the same period. The settlor probably saw the inconvenience likely to arise from the old form of lease, and cautiously guarded against their being made for the future, as they had been before. This objection could not have been made, as has been suggested in *Smith v. Doe dem. E. of Jersey*, because in that case there was a covenant in the lease to pay a proportionable part of the rent that might accrue due between the last quarter day and the expiration of the lease.

The second objection to this lease is, that the power requires, that the rent shall be made payable *yearly* during the continuance thereof, and it is made payable only half-yearly. If the words of the power had been merely "the yearly rent," this objection could not prevail, but the power requires not only that there shall be a *yearly rent*, but that it shall be *payable* yearly. Now, if the power absolutely requires a yearly reservation, it has not been duly executed. Gilbert on Rents, p. 50, is an authority to show, that if there be a lease reserving a rent of 50*l.* yearly, that must be a rent at the end of the year. And if there were an agreement for a lease at a yearly rent, payable yearly, there can be no doubt that a court of equity would compel the execu

tion of a lease, making the rent payable at the end of the year. Here too, there may be a prejudice to the remainder-man, for if the lessor dies during the second half year, the remainder-man will lose his half year's rent, and there can be no apportionment in such a case, for the statute 11 G. 2, c. 19, applies to cases where the lessor dies in the middle of the quarter. The fourth resolution in *Lord Mountjoy's case*, 5 Rep. p. 4, is an authority to show, that a reservation of rent at two days, where the rent was before reserved and payable at four days, makes the lease void. In *The Dean and Chapter of Worcester's case*, 6 Rep. 37, the question turned upon the validity of a lease granted under the 13th Elizabeth, c. 10, which gives a power to ecclesiastical persons to grant leases, whereupon the accustomed yearly rent or more shall be reserved. There the rent reserved had formerly been payable quarterly, and it was made payable half-yearly. The statute which created the power, did not say that the rent should be payable yearly, but only that the accustomed yearly rent should be reserved, and there the Court are reported to have said, "It is sufficient if the accustomed rent be reserved yearly at one time," for the words of the act are, "whereupon the accustomed yearly rent or more shall be reserved, and therefore, if the rent be yearly reserved, the statute is satisfied by reason of the word yearly." Now here, there are the words *payable yearly*. It may therefore be fairly inferred, that if the rent had been not only reserved, but made *payable yearly*, it would have been held a good objection. In *Campbell v. Leach*, Ambler, 740, the power required only that there should be reserved the best, and most approved yearly rent. The objection was, that the rent was made payable quarterly instead of yearly, to which it was answered, that the power was silent in that respect, and only required a yearly rent to be reserved. In *The Earl of Cardigan v. Montague*, reported in the Appendix to Sugden on Powers, p. 690, the power very nearly resembled the power in this case, but this objection was never taken, and therefore that case cannot be considered as any authority.

The third objection is, that this lease restrains the power of distraining, and takes away the power of sale. In *Taylor dem. Atkyns v. Horde*, 1 Burr. 121, Lord MANSFIELD says, "It is not sufficient that the ancient rent be reserved, it must be reserved with all the beneficial circumstances." For that purpose the remainder-man should have reserved to him all the rights given to him by common and by statute law to satisfy himself for the rents in arrear. By common law he might distrain as soon as the rent was due; and by stat. 5 W. & M. c. 5, s. 2, he might sell the distress. By the terms of the lease the lessor can only enter to distrain after a reasonable demand in that respect, and when he has entered, &c., he cannot sell the property distrained; but he is allowed only to detain the distress as a security, as he might have done before the statute of the 4 & 5 W. & M. This covenant must be construed for the benefit both of the lessee and lessor. In return for some extraordinary powers of distress, which the lessor would not otherwise have had, he must be taken to have renounced others which the law would otherwise have given him, and to have restrained himself to the acts which are here enumerated and defined.

The fourth objection arises upon the proviso for re-entry. The words of the power are, "So as in every such lease there be a condition of re-entry for non-payment of rent and rents thereby to be reserved;" and by the lease the right of re-entry is postponed for twenty-eight days. An inconvenience not before adverted to, from allowing an interval between the day the rent becomes due and the day of re-entry, is, that in this way the remainder-man is deprived of all possibility of recovering rent from the last quarter-day to the day when his right of re-entry accrued. In ejectment, he must lay the demise after the twenty-eight days are expired; he, therefore, cannot recover rent during the interval in an action for mesne profits; he cannot bring covenant on the lease, for the lease has expired, and the forfeiture has reference back to the period of re-entry; nor will use and occupation lie, the holding being under a demise by deed. This case is distinguishable from *Smith v. Doe dem. Earl of Jersey*, on the ground, that here a demand is required; for the words are, "being lawfully demanded." That imposes an unreasonable restriction on the right of entry, and deprives the remainder-man of the benefit of the statute 4 G. 2, c. 28. *Coze v. Day*, 13 East, 118, is an authority in point, and, in the opinion given by BEST, J., in *Smith v. Doe dem. Earl of Jersey*, 2 Brod. & Bing. 504, in the House of Lords, that learned Judge says, "Such a proviso could not be sufficient under such a power." It is true that, in *Doe dem. Scholefield v. Alexander*, 2 Maule & S. 525, it was held by the majority of the Court, Lord ELLENBOROUGH, C. J., dissenting, that where a lease, granted since the stat. 4 G. 2, c. 28, contained a power of re-entry upon the rent being unpaid for twenty-one days, the same being lawfully demanded, no demand was necessary. It is to be observed, however, that the statute 4 G. 2, c. 28, only places the subject in precisely the same situation in which the king was before the statute. Before the statute, if the king granted a lease, with a power of re-entry, it was considered beneath his dignity to demand rent on the last day of the year, and, without so doing, he might proceed for the forfeiture; but it had been expressly held,* that if a reversion came to the king of a lease, in which there was a right to re-enter for non-payment of rent on demand, he could not maintain ejectment without making a demand; and also, if the king himself made a lease, reserving a rent, with a power of re-entry on non-payment of rent on demand, he could not proceed without a demand.† This is an authority (and it was not referred to in the case of *Doe dem. Scholefield v. Alexander*) to show that, where there is an agreement between the parties, there must be a demand before ejectment can be brought; and, if so, then the condition annexed to the right of re-entry in this case, that the rent shall be lawfully demanded, is a restriction of the right, and the lease is not a due execution of the power.

The fifth objection is, that this is a lease of premises which had been formerly demised jointly with others, at a pro rata rent. The rent, if apportionable, is, in this case, fairly apportioned; but it cannot be apportioned at all. The person in possession of the estate cannot subdivide farms, or lay together two farms which have been let separately;

* Dyer, 87, 210.

† Bacon's Abr. tit. Rent, 127.

for if he does either of these things, the usual and accustomed rent is not reserved; and it certainly is the practice of conveyancers to insert an express authority in settlements for that purpose. The fifth resolution in Lord Mountjoy's case is an authority expressly in favour of this objection. In *Smith v. Trinder*, Cro. Car. 22, a similar question arose, but was not decided. The statute 39 and 40 G. 3, c. 41, is a legislative declaration of the law upon that subject. Before that statute ecclesiastical persons might, under the 32 H. 8, c. 28, grant leases for twenty-one years or three lives, reserving the rent most accustomedly paid within twenty years next before such lease, and it had been considered, that ecclesiastical persons could not grant a lease of a part at a pro rata rent, and the 39 and 40 G. 3, c. 41, was passed expressly to remedy that inconvenience, and to enable them so to do; but it does not apply to tenants in tail, or at all interfere with private settlements; and if, before that statute, ecclesiastical persons could not grant a lease of a part at a pro rata rent, it follows, that persons having such a power of leasing under settlements, cannot now grant a lease of a part at a pro rata rent.

W. E. Taunton, contra, was stopped by the Court.

ABBOTT, C. J. I am of opinion that this is a good and valid lease. The objections taken to it arise upon a supposed variance between the terms of the lease and the power under which it was granted. By the power a lease may be granted for twenty-one years, or for any term of years determinable upon three lives, "so as, upon all and every such lease and leases, there be reserved and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, boons, and services for the same." It appears, that on the 2d February, 1708, (which was before the act of parliament by which the estate was settled, and prior to the statute of the 4th G. 2, c. 28) a lease had been granted of these and other premises, in which there was the following reddendum; "yielding and paying, therefore, yearly and every year, during the said term, thereby letten unto the said duke, his heirs and assigns, the yearly rent or sum of 82*l.* at the two usual feast days or terms in the year, called the feast of the annunciation of the blessed Virgin Mary, and the feast of St. Michael the archangel, by even and equal portions." Whether any lease was granted between that lease and the lease of the 13th January, 1756, does not distinctly appear. The next lease stated in the case, is one of the 13th January, 1756, by which the premises which are comprised in the lease in question in the present case (being a part only of what had been demised by the lease of 1708) were demised, and the rent reserved was 32*l.* 10*s.* per annum, payable at Lady-day and Michaelmas in every year. The lease of the 6th January, 1785, reserves a rent of 50*l.* per annum, payable at the same two feasts as are mentioned in the two former leases. It is observable, too, that each of those leases is granted at a period less than half a year before the first day of payment. The first objection made to the present lease is, that the rent being reserved half yearly, the first payment is to take place at a period less than half a year distant from the day of the demise; and in support of that objection, the case of *Doe v. Giffard* has been cited. That case, however, is very distin-

guishable from the present. In that case the power was to lease, at the best and most improved yearly rent that could be obtained. The power under which this lease is granted, requires that there be reserved the usual and accustomed yearly rent. Now, as far as we have any evidence what the usual and accustomed yearly rent was, it appears to have been a yearly rent payable at Lady-day and Michaelmas. I am, therefore, of opinion, that a rent payable at those days, although the right to demand it arose in less than half a year, is a usual and accustomed rent, within the meaning of those words in the condition contained in the leasing power. Indeed, when we consider that this is a lease for lives, granted upon the surrender of another lease, we cannot help seeing, that it is, in effect, an extension of time upon fresh terms, and where the time only is extended, it is most reasonable that the day of the payment of the rent should continue to be the same, and should not vary according to the day on which the new lease may happen to be granted.

The second objection is, that there is, in the lease in question, a half-yearly reservation of rent, whereas it is contended that the words of the condition contained in the leasing power cannot be satisfied unless the rent reserved be payable once a year only, viz: at the end of the year after the making of the lease. The observation I have already made, that a yearly rent, payable at Lady-day and Michaelmas, was the usual and accustomed yearly rent, applies also to this objection. It is admitted, that if the words of the power had been "so that there be reserved and made payable during the continuance thereof, the usual and unaccustomed yearly rent," without the word "*yearly*," immediately following the word "*payable*," a rent reserved half-yearly would have been sufficient, that is, that a payment by portions at the end of each half-year, or at the end of each quarter of the year, does not prevent the rent from being, in the common understanding of mankind, and in common parlance, a yearly rent. I cannot see any reason why the words "payable yearly during the continuance thereof," should make any difference. I cannot suppose the legislature to have intended in this case to make the rent payable only once a year, which certainly is unusual, and not beneficial to the landlord. To adopt the construction contended for would be to suppose that the legislature intended that the leases to be granted under the act of parliament, should be different in their form and effect from ordinary leases of lands and tenements, granted at beneficial rents. I cannot think that this was intended, and, therefore, I cannot give that construction to the words in this case. The ordinary reservation of rent in leases is "*yielding and paying yearly and every year*." In this case the words are "yearly during the continuance thereof, the usual and accustomed yearly rent," which I understand to be the yearly rent of so many pounds, by so many half-yearly or quarterly payments in the year; and I think we ought to construe these words "*payable yearly*," with reference to the common language of leases, which was the subject respecting which the legislature was speaking in the clause before us.

The third objection is, that the clause enabling the landlord to dis-

train is a restriction upon him, and injurious to the remainder-man, for it is said that, under this power, he cannot distrain without making a demand, and when he has made the distress, that he cannot sell. Now, if this objection avoid the lease, it must do so, not by reason of its contravening any particular condition contained in the leasing power, but by reason of its being contrary to its general nature and object, which is, that there should be a lease at a yearly rent, with the usual and beneficial modes of enforcing payment. It is to be observed, that the clause itself refers not merely to the payment of the rent of 50*l* but to payments in nomine pœnæ; the words are, "if it shall happen the said yearly rent, or sum of 50*l*. shall not be paid at the days and times aforesaid, or if the said amerçiements, pains, fines, and penalties, in nomine pœnæ, after reasonable demand be not paid, then the lessor may dristain." It appears, however, that this clause was copied from the lease of 1708, and we ought to pause before we hold, that such a clause, copied from the former lease, (and which the party who prepared the instrument, after the act of parliament, probably had before him,) vitiates this lease. I cannot think, however, that the landlord is abridged by this cause of any remedy for the recovery of his rent, which he otherwise would have had. Independently of this clause, the landlord has a power to distrain, and a power to sell under the distress. And I cannot give such an effect to the language of this clause as to say, that it was intended to deprive the landlord of any power which he had by the common and statute law. The true construction of it appears to me to be, to consider it as introduced in furtherance of the power under the common law, and I think that we cannot give it the construction contended for, unless we see clearly that the landlord at the time of granting it, intended to take away the power under the common law.

The fourth objection is as to the right of re-entry. It is said, this is to be only at the end of twenty-eight days after the rent is in arrear, and the same "being lawfully demanded." Now as to the right of re-entry not accruing till the expiration of a given number of days, the case of *Smith v. Doe dem. the E. of Jersey*, is directly in point. It was there decided, that the words contained in this power, "so that there be conditions of re-entry for non-payment of rent," are to be interpreted to mean a usual or reasonable condition of re-entry; and if that be so, it appears from the lease of 1708, that twenty-eight days are there given for the payment of the rent, before the landlord can re-enter; with this additional clause in favour of the tenant, that if there be no sufficient distress upon the premises, the landlord may then re-enter.

Another objection is, that by the terms of this lease the landlord is "to re-enter on the rents being lawfully demanded;" and it is said, that this puts the landlord to the necessity of making the demand, notwithstanding the stat. 4 Geo. 2, c. 28, which was made generally for the purpose of relieving the landlord from the necessity of making that demand. In *Doe dem. Scholefield v. Alexander*, three of the judges of this Court, Lord ELLENBOROUGH, C. J., rather doubting than dissenting, decided that, notwithstanding the words "lawfully demanded" in a lease, the landlord has a right to the benefit of the statute of 4 G. 2, c. 28,

and may re-enter. I certainly am of that opinion. By the common law, the landlord never could re-enter without making a demand. Every clause of re-entry, therefore, contained the words "lawfully demanded," in effect, though not in terms; and therefore in the lease of 1708, those words were quite nugatory. They were probably copied inadvertently into the subsequent leases without considering their effect. I am of opinion, that such a proviso for re-entry, which was originally introduced for the benefit of the landlord, ought not to be construed, in consequence of the introduction of those words (which were nugatory in the former leases) to deprive the landlord of the benefit intended to be conferred upon him by the statute 4 Geo. 2, c. 28. The case might have been otherwise, if the lease had contained an express covenant that he would not re-enter without demand, or that having entered he would not sell.

Then comes the last and remaining objection, which raises this question: whether the rent can be apportioned? Whether or not it is competent to the owner of a considerable estate to make any improvement or alteration in the mode of disposing of that estate? If he cannot divide a farm, but is bound to let it altogether, as it formerly was, improvement must in many cases be utterly prevented, and the remainder-man be deprived of the benefit. Independently of authority, I certainly should have thought that that which was for the benefit of the estate might lawfully be done, and that an apportionment of rent might be made, and that the land might be subdivided, provided care was taken to apportion for the parts of the farm so divided, as much rent as had been reserved in respect of them in the lease comprising the whole. Lord Mountjoy's case has been cited upon this point. The doctrine there laid down upon this subject, however, was not the point which the Court there decided, and the very learned person in whose report that doctrine is found, has, in his commentary on Littleton, expressly laid it down as law, that there may be a leasing of part, reserving a rent bearing the same proportion to the former rent as the part leased bore to the whole land. He says, "If tenant in tail let part of the land accustomably letten, and reserve a rent pro rata, or more, this is good, for that is in substance the accustomable rent." Co. Litt., 44 b., and Lord Mountjoy's case is referred to in the sentence immediately preceding. I am of opinion, that the law, as so laid down by Lord Coke, is consonant to reason, and that it is competent to lease a part, reserving a true and fit proportion of that rent which had formerly been reserved. The case of *Smith v. Trinder*, is an authority upon that point. It is true that the 39 and 40 Geo. 3, c. 41, after reciting that doubts had arisen, whether ecclesiastical persons could lawfully grant separate leases of parts of lands usually demised by one lease and under one rent, enables them so to do. But we are not necessarily to infer from thence, that those doubts were well founded. Acts of parliament for the purpose of removing doubts are very beneficial, because they prevent that expense of litigation, which otherwise must take place, in order to have such doubts resolved. For these reasons, I am of opinion, that this is a good and valid lease, and that the postea should be delivered to the defendant.

BAYLEY, J. I am of the same opinion. The objection to the lease is, that it is not conformable to the leasing power contained in the statute 6 G. 1. That act applies not merely to the premises in question, but to lands of very large extent, lying in several different counties; and, it appears to me to have been the intention of the legislature, that, as long as there should be heirs of the body of the settler, the estate should not be alienated. The act contains a leasing power, with this provision, "So as upon all and every such lease and leases there be reserved and made payable, yearly, during the continuance thereof, the usual and accustomed yearly rents, boons, and services for the same." Now, the first question arises upon these words; and, in order to know what were the usual and accustomed rents, I take it to be quite clear, that we may look to the previously existing leases. That point was decided in *Smith v. Doe, dem. E. of Jersey*, 2 Brod. & Bing. 504. It is impossible to tell what was the state and condition of the property which is to be the subject of future leases, unless by referring to what were the then existing leases, nor can it be ascertained what is the usual and accustomed rent, unless by referring to the different leases, to see what has been the rent from time to time received. It has been said, that the old lease might be referred to for the purpose of ascertaining the quantum of rent, but not for the purpose of ascertaining the time and manner in which the rent was reserved and made payable. In order to judge, however, whether a rent is usual and accustomed, all the circumstances connected with that rent must be considered. The time and the mode of payment are some of those circumstances from which a judgment may be formed, whether it was the usual and accustomed rent or not. In Lord Mountjoy's case, and in the Dean and Chapter of Worcester's case, the Court did refer to the mode in which the old rent was reserved, and from comparing the new and the old reservations, certain objections were made to the existing leases. Now that could not have taken place, unless it was deemed competent for them to look at the old leases, to see the mode in which the old rent was reserved, for the purpose of considering whether it was a usual and accustomed rent. If the old rent is reserved quarterly, the new rent reserved is not usual and accustomed, unless it be a quarterly rent also. In this case, the words of the power are, "so as upon all and every such lease and leases, there be reserved and made payable yearly." Great stress has been laid upon the word *yearly*, and it has been contended, that the true construction of that word requires, that there should be one entire yearly payment. I, however, consider the words "*made payable yearly*," the same as if the words had been, "*payable every year*." In leases there is usually a covenant, that the lessee shall pay yearly and every year, and by the reddendum, he is to pay the yearly rent of so much by half yearly or quarterly payments. It appears to me, that the word yearly does not necessarily mean one entire rent for the year, and in this case, although a yearly rent might be more beneficial to the successor, yet it would not be the usual and accustomed rent, for it appears from the old lease, that the usual and accustomed rent was by a half yearly payment. And it cannot be supposed, that with respect to such extensive possessions, it

was intended to give an undue advantage to the remainder-man. The tenant for life and the remainder-man must have been intended to be placed on fair and equal terms, and that will not be the case, unless the rents reserved under the new leases are reserved in the same manner and form as they were in the old ones. It appears, that by the old leases the rent was reserved half yearly, which was as little beneficial to the remainder-man as the reservation in this lease. I think, therefore, that this does not constitute any objection to the lease in question.

The next objection is, that the landlord is restricted from distraining and from selling. That does not appear to me to be so. It is a rule of construction, that where a clause is introduced into a deed, or into an act of parliament in order to confer a benefit, it is not to be construed so as to work a prejudice, or in other words, that where the intention of the clause is to give a further right, it is not to be construed so as to take away any other right existing without it. Now, applying that rule to the present case, this clause must not be construed to take away from the lessor any right he had. At common law, the lessor had an unqualified right to distrain, and by statute to sell the distress. There is another answer to this objection, that this is a reservation in the usual and accustomed mode, for the lease of 1708 contains almost verbatim the same provision with respect to the rent there reserved, and then this rent being reserved exactly under the same circumstances, it becomes in that respect the usual and accustomed yearly rent.

The objection that twenty-eight days are allowed, after non-payment of the rent, before re-entry, is also answered by the old lease, and the decision in the House of Lords, in the case of *Smith v. Doe, dem. E. of Jersey*. The words of the condition in the power are, "and so as in every such lease there be contained a condition of re-entry for non-payment of the said rent and rents thereby to be reserved." Now this lease does contain a condition of re-entry for non-payment of rent. It is said, however, that it is qualified by the words "being lawfully demanded," which words were not in the lease in the case of *Smith v. Doe, dem. E. of Jersey*. In the old lease, in this case, however, it is part of the proviso of re-entry, that the rent shall be lawfully demanded, and, therefore, the provisos in the two leases correspond in this respect, and the tenant in tail in possession, and the tenant in tail in remainder, are, to all intents and purposes, upon the same relative terms as they were at the time when the act of parliament was passed.

The remaining objection is, that this is a lease of part of certain premises, which at the time of passing the act of parliament, were in lease jointly with other property, and that it was not competent to the lessor to lease property separately at a pro rata rent, which had formerly been jointly demised. I think, however, it would be most unreasonable so to construe this power. The only authority in favour of such a construction is Lord Mountjoy's case. That case, however, was not decided upon that point. There an acre of waste land was introduced into the lease, and the entire rent was reserved out of that acre, as well as out of the anciently demised lands. The ground of the decision was, that the old accustomed rent was not confined to, and therefore

was not issuing out of the old accustomed letten lands. The opinion stated to have been delivered by the Judges upon the other point was extra-judicial; and when we consider that Lord Coke, in his commentary upon Littleton, which was published some years after *Lord Mountjoy's case*, lays it down as clear law, "that a tenant in tail may let part of the land accustomedly letten, and reserve a rent pro rata, or more," it appears to me, that there either must have been some mistake in that part of the 5th Coke, or that the opinion of the profession was decidedly against the doctrine there laid down. I am clearly of opinion, in this case, upon reason as well as authority, that the tenant in tail had a right to let part of the lands, which at the time of the passing of the act of parliament, were under one demise at one entire rent, provided he took care to reserve the proportion of that old rent which the land divided bore to the whole property. For these reasons, I am of opinion, that the lease cannot be impeached, and, consequently, that the postea must be delivered to the defendant.

HOLROYD, J. I am of opinion that the lease is conformable to the power, and therefore a valid lease. The power requires that there be "reserved and made payable yearly, during the continuance of the lease, the usual and accustomed yearly rents, boons, and services for the same." If, then, there be reserved in the lease and made payable during the continuance thereof, the usual and accustomed yearly rents, boons, and services, the lease is valid. Whatever might have been my opinion upon some of the points, if the case of *Smith v. Doe dem. E. of Jersey* had not been decided, I must now take the law to be such as it was finally decided in that case. That case established two points, first, that a reference might be had to the former leases, for the purpose of ascertaining what was the usual and accustomed rent, and for such other purposes as form the subject of contest upon the present occasion; second, that the same construction is not necessarily to be given to the words of the power, as the same words must have received if they had been used in the lease itself. One objection is, that this rent in this lease is reserved half-yearly, and that the power requires that it should be reserved and made payable yearly, during the continuance thereof, &c. It is admitted, that if the word yearly had referred to the reservation only, and not to the mode of payment, this would have been a sufficient execution of the power, though the rents be made payable half-yearly. I think, however, that in common parlance the word yearly, used in this and other leases, means, not a payment of rent once a year, but that the same is to be paid in or during every year, and that seems evidently to have been the meaning of the person who prepared this lease; for the words of the reddendum are, "yielding and paying yearly and every year, the yearly rent or sum of 50*l.*, upon the 25th March and the 29th September, by even and equal portions." So that the person who framed this lease, states it to be a yearly rent, and still makes it payable by two half-yearly payments, and that is consistent with the old leases. In one sense of the word, therefore, this rent is payable half-yearly, but, in another sense, it is payable yearly, because it is payable during the year; and if the

latter sense can be given to the expression in this lease, I think it ought to be construed to have that meaning. Besides, if we refer to the former leases, which, according to the case of *Smith v. Doe dem. E. of Jersey*, we are at liberty to do, this appears to be the usual and accustomed yearly rent; for it is payable yearly in the accustomed manner, that is, every year, by the two usual half-yearly payments.

Another objection is, that the rent reserved was made payable at an earlier day than it would have been payable, if it had been made payable at the end of each year; and it has been said, that the power must be construed in the same manner as if the very words of the power were contained in the lease itself; and, undoubtedly, if the redendum had been yielding and paying yearly, without saying any thing as to the times of payment, no rent would have accrued due until the last day of the year. In *Smith v. Doe dem. E. of Jersey*, a similar argument was used, for it was contended, that if the lease in that case had provided, that a party should have power to re-enter, on non-payment of rent, he might enter immediately upon default being made. The House of Lords, however, decided otherwise, for they construed the words giving the right of re-entry in a different sense from that which they must have received, if they had been used in the lease itself. In this case, the rent is made payable half yearly, and whatever might have been the case, if it had not appeared from the former leases, that that was the usual and accustomed mode of paying the rent, I think it does appear from them, that this was the usual and accustomed rent, payable in the usual and accustomed manner.

Another objection to the lease is, that the clause of distress takes away the right of the party to distrain previously to the demand of the rent, and also that when he has distrained, it takes away the power of selling under the statute. I think, however, that this being a covenant for the benefit of the landlord, it does not take away any right which he had by common law, or by statute, and, consequently, that notwithstanding that covenant, he might distrain without demand, and might sell the distress. Besides, this objection goes to its not being the usual and accustomed rent. Now, it appears that this clause has been adopted from the former leases, and therefore that this is the usual and accustomed rent, reserved in the usual and accustomed manner.

Another objection is that the right of entry is postponed for twenty-eight days; that point, however, was determined in *Smith v. Doe dem. E. of Jersey*; and besides, the former leases had this very clause, and therefore afford an answer to that objection. The same answer applies also to the qualification as to the rent being lawfully demanded, and I am of opinion that the 4 Geo. 2, does apply to a case of this kind; and that notwithstanding those words, the landlord, without making any demand, might enter, distrain and sell.

I am also of opinion, upon principle as well as authority, that a party may demise a part of premises formerly demised jointly with others, provided he reserve a fair rent. The passage referred to from Coke upon Littleton, 44, b., is a strong authority upon that point, and I think the doctrine there laid down by Lord Coke a right exposition of the law

For these reasons, in addition to others which have been given by my Lord and my Brother BAYLEY, it is my opinion that since the decision in the case of *Smith v. Doe dem. E. of Jersey*, whatever might have been the case previously, this lease must be considered as valid.

Judgment for defendant.*

* Best, J., was absent at Chambers.

BARTON and Another v. WILLIAMS and Others.—p. 395.

A. and B. having agreed to purchase cottons on their joint account, directed their brokers to purchase the same. These purchases having been made, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession as the brokers of A. Immediately after the purchase, B. paid A. one half the value. After considerable purchases had been made, the brokers were informed that B. had an interest in the goods purchased; A., after this, directed the brokers to procure him a loan on the security of the warrants, and C. advanced money by discounting bills drawn by A. upon the brokers, as a security for which the whole of the warrants were deposited with C. by the brokers. While they were so deposited, the brokers received directions, both from A. and B., to make a division of the goods held on their joint account, which they did by appropriating specific warrants to each party, and which division was approved of by both. Before the bills became due, the brokers were directed by A. to get one half renewed, which C. agreed to do, and discounted fresh bills, and the brokers then left in the hands of C., as a security for the money thus advanced, the warrants belonging to B.; C., however, not knowing that B. had any interest in them:

Held, first, that the first pledge did not transfer to C. any interest in that part of the goods which belonged to B. Semble, that a sale by one of two tenants in common of the whole property, is a conversion as to the share of one; and, consequently, that trover is maintainable:

Held, second, that after the partition had taken place, the tenancy in common, if it ever had existed, was determined, and that being so, the second pledge was the pledge of a specific chattel belonging to B., which the brokers had no authority to make, and that trover was maintainable.

TROVER to recover from the defendants the value of certain East India warrants for the delivery of a quantity of cotton, and certain quantities of cotton stated in the declaration. At the trial before ABBOTT, C. J., at the London sittings after last Michaelmas term, a verdict was found for the plaintiffs, damages 7337*l.*, subject to the opinion of the Court on the following case:

In the year 1818, John Moon, who then carried on business at Manchester as a cotton merchant, under the firm of J. Moon and Son, having agreed with the plaintiffs, (who also carry on business at Manchester,) to make a purchase on joint account with them of cottons, gave directions to his brokers, Hunt and Sharp of London, to purchase at the East India Company's sales cotton to a considerable amount, on the account of J. Moon. Hunt and Sharp accordingly purchased at several sales between the months of January and June in that year, cotton to the amount of 20,000*l.*, and obtained orders for the delivery of it, commonly called East India warrants, which were made out in the name of Hunt, as the broker employed at the sale, and were left in the possession of Hunt and Sharp, as the brokers of the said John Moon

The plaintiffs, immediately after the purchases, paid Moon and Co. one half of the value of the cottons. Hunt and Sharp knew that Moon and Co. were occasionally in the habit of making purchases on joint account, but at the time of making the first purchases in question, had no knowledge that the plaintiffs were in any way concerned. When half the purchases were completed, they were apprized that the plaintiffs had some interest in the purchases in question. It was subsequently agreed between the plaintiffs and J. Moon, that the cottons should be divided, and accordingly in February, 1819, written directions were given by the plaintiffs to Hunt and Sharp to make division of the cottons held by them on the joint account of Moon and the plaintiffs, and they having received similar directions from Moon and Co. proceeded to make the division by specifying in separate columns the warrants which were respectively appropriated to the plaintiffs and Moon and Co.; and on the 20th February, 1819, they communicated such division to both parties, and received their approbation of the same. At the latter end of November, 1818, Moon directed Hunt and Sharp to procure him a loan of from 20,000*l.* to 25,000*l.* on the security of the East India warrants then in their possession, and they informed the defendants of the request of J. Moon, and applied to them to discount the acceptances of them, Hunt and Sharp, on bills drawn on them by Moon and Co., on the security of the whole of the warrants, which the defendants agreed to do; and accordingly, eight bills, payable at three months after date, were drawn by J. Moon and Son, upon and accepted by Hunt and Sharp, falling due respectively 27th February, 1st March, 3d March, and 4th and 5th March, all of which were duly paid at maturity. These bills were discounted by the defendants at the beginning of December, 1818; and at the time of receiving the money from the defendants, and as a security for the payment of the bills, Hunt and Sharp deposited with the defendants the whole of the warrants.

On the 23d February, Hunt and Sharp received from Moon and Co. the following directions contained in a letter, dated 15th February, 1819: "Half the amount from Williams, is all I would wish, or even nothing, if you can force off every bale of cotton I have in London. Cash in time, if half should be done by Williams and Co. Mr. B.'s warrants might remain." And, in consequence, an application was made by Hunt and Sharp to the defendants to renew 10,000*l.* of the amount of the original bills, which the defendants agreed to do, by discounting other bills, similar to the former, on a sufficient number of the warrants to cover them to that amount, being left as a security for such renewal. Hunt and Sharp did not, at any time previous to such renewal, communicate to the defendants that any alteration had taken place in the property, or that the plaintiffs had any concern in it. On the 2d March, Sharp, of the firm of Hunt and Sharp, received the warrants from the defendants for the express purpose of dividing them, so as to take 10,000*l.* worth of them away, and to return 10,000*l.* worth to the defendants, to remain as a security for the renewed bills, and took them to his counting-house for the purpose of making such sepa-

ration; and having done so, returned to the defendants the warrants belonging to the plaintiffs, and retained those which had been appropriated to Moon and Son; and in doing so, acted by the direction of Moon and Son; but without any communication with or authority from the plaintiffs. The defendants discounted two bills, of 2490*l.* 8*s.* and 2569*l.* 12*s.* respectively, drawn as before, by Moon and Son, upon, and accepted by Hunt and Sharp, on the 2d of March; and two other bills, of 2496*l.* 15*s.* and 2564*l.* 15*s.* on the 11th March; which four bills amounted to 10,121*l.*, and which were dishonoured when they became due. The defendants sold the cottons in question for 7337*l.*

The question for the opinion of the Court was, whether the plaintiffs were, under the circumstances, entitled to maintain the action of trover.

F. Pollock, for the plaintiffs. The original pledge of all the warrants cannot be sustained as against the plaintiffs. And, if it could, at all events, the renewed pledge, made subsequently to the division of the property, cannot be sustained. There is a material distinction between a sale and a pledge. In the case of a sale, the purchaser trusts the property; in the case of a pledge, the party lending his money trusts the individual who borrows; and if the latter has no authority to pledge, the pledge is not available. In this case, the brokers, in August, knew the property to belong to Moon and the plaintiffs, and then, by Moon's direction, pledged the whole with the defendants. Now, the brokers had no authority to pledge the plaintiffs' share; and, therefore, the pledge is not available as against them; and, if that be so, supposing the brokers to have been justified in pledging the warrants, as far as Moon's share was concerned, the defendants would thereby become tenants in common with the plaintiffs of the whole property, and the sale by them is a conversion as to the plaintiffs' share; for the sale having taken place in London, was a sale in market overt; and, therefore, operated as a destruction of the property, and, consequently, trover is maintainable. It is clear, however, that after the division of the property, the brokers had no authority whatever to pledge the share belonging to the plaintiffs. All the warrants were returned in the brokers' hands, and it was their duty, as the agents of the plaintiff, to retain those which belonged to them. Instead of which, however, they, by the direction of Moon, leave the warrants, which were then the property of the plaintiffs, as a security for money advanced to Moon. They could not thereby convey any interest in the plaintiffs' separate property to the defendants; and the sale by them of that property is a conversion.

Tindal, contra. This was, in the first instance, a deposit by the broker of warrants belonging to his principal, Moon, at the request, and for the benefit of the principal, and of which the principal had the sole power of disposal, as between him and the broker. Moon gave the directions to the broker to purchase on his own account, and the purchase was so made, and the warrants were deposited with Hunt and Sharp, as the brokers of Moon. Moon, therefore, at the time of the first pledge, had the sole right of disposing of the warrants, and he having authorized the brokers to pledge, the defendants by that pledge

acquired an absolute interest in the property. But even if that were not so, and the brokers only had authority to pledge the undivided share of Moon, the defendants, by taking that pledge, became tenants in common with the plaintiffs; and then it is clear, that trover cannot be maintained by one tenant in common against another. And a sale does not amount to a conversion. In this case too the subsequent division of the cottons, and the fact of the brokers having returned the plaintiffs' warrants instead of those of Moon's, as a security for the renewed bills, cannot make any difference, for all the bills were subject to the lien. The warrants were delivered to the brokers for an express, specific purpose, viz. to divide them, and to return one-half to be subject to the lien of the old and renewed bills for 10,000*l*. The warrants were never out of the defendants' possession, for the brokers for this purpose were their agents, and the possession of the brokers, therefore, was the possession of the defendants. If the bankers themselves had made the division in their own office, it is clear that they would have had a lien upon the warrants retained. The warrants were carried to the brokers' counting-house merely for convenience, and consequently the lien continued. If there had not been any previous division of the property, there would have been no doubt upon this point, but such division cannot make any difference, being done without the knowledge of the pawnee, especially where the plaintiffs have allowed Moon to hold himself out to the world as the ostensible owner. In *Rabone v. Williams*, 7 T. R. 360, it was held in the case of a factor dealing for a principal, but concealing his principal's name, that a person contracting with him has a right to consider him, to all intents and purposes, as a principal, and that though the real principal bring the action in his own name, the purchaser may set off any claim he has against the factor. And so if there is a secret partner unknown to the defendant at the time he contracts with the plaintiff, the plaintiff cannot, by joining such secret partner in the action, deprive the defendant of his right of set-off against himself, *Stracey v. Deey*, 7 T. R. 361. It is clear too, that if the plaintiffs were partners with Moon, the original pledge by one of the partners was valid.

ABBOTT, C. J. I am of opinion that the plaintiff is entitled to recover. I think it clear, that the pledge by Hunt and Sharp cannot, in point of law, operate so as to give to the defendants any right or interest in that part of the goods which belong to the present plaintiffs. It has been said, however, that trover cannot be maintained, because there was no conversion, on the ground that at the time of the original pledge, the plaintiffs were tenants in common with Moon, who was the owner of an undivided moiety. It is laid down by Lord Chief Baron Comyn, that if a bailee sells the goods of another, the very act of sale on his part is such a conversion as to entitle the owner to maintain trover,* and if that be so, it follows, that if a bailee, in possession of undivided shares belonging to two persons, sells the whole, it must be a conversion as to the undivided part belonging to one, over which he has no right or title whatever. I incline to think, therefore, upon that ground,

* Com Dig. tit. *Action on the case upon Trover*, E. and 2 *Salk.* 655, is cited

that the pledge could not operate upon the property of the plaintiffs; and that even if there had been no partition, the sale was a conversion of the undivided interest, and therefore that trover may be maintainable. Upon the other point I do not entertain any doubt. In this case, after the warrants were in the hands of the defendants, a partition was made between the plaintiffs and Moon, and thereby the tenancy in common was determined, and after that partition, an entire new transaction takes place, for Moon and Son agree not to hold the defendants to the payment of the bills originally accepted, but fresh bills are drawn in the same manner, and by the same parties. It is a new pledge, and having taken place after a partition was made between two tenants in common, it was the pledge, not of an undivided moiety, but of a specific chattel, of which the property was at that time vested in the plaintiffs, and made by a person having no authority to pledge. I am, therefore, clearly of opinion, upon the last ground, that the plaintiff is entitled to our judgment.

BAYLEY, J. It is clear law, that a pawnee can have no better title than the pawner. At the time of the original pledge, Moon and Co. and the plaintiffs were not partners with reference to these goods, but part-owners; each of them being entitled to an undivided moiety. Moon and Co. then take upon themselves to pledge the whole, the legal operation of which pledge would be to give to the pawnee no better title than Moon and Son had, which would be an undivided moiety only. And if the case had stopped there, Moon and Son before the pledge, and the defendants after the pledge, would have had a right to sell an undivided moiety only; and if they had taken upon themselves to sell without any authority from the plaintiffs, either express or implied, from the nature of the transaction they would have been wrong-doers with respect to the sale of the plaintiffs' moiety; that would be a wrongful sale, and consequently a conversion of their property. There may be cases in which the indivisible nature of the subject-matter of the tenancy in common, may raise an implied authority in one to sell the whole. But unless there be such authority, either express or implied, a sale of the whole by one tenant in common is, with respect to the other, a wrongful conversion of his undivided part. But this case does not stand upon the original pledge, for afterwards a renewal of the bills took place, and all the warrants were put into the hands of the brokers, in order that a part might be withdrawn from the pledge, and that the residue might continue liable, not for the old pledge, but merely in respect for the new bills which were to be given for part of the whole debt; and the brokers acting in that transaction as the agents of M. and Co., had a right to pledge their share only; for in the intermediate time there had been a bargain between M. and Co. and the plaintiffs, that certain of the warrants should be deemed the separate property of each party. At that time what authority had the brokers? They had authority to pledge the property of M. and Co., but none whatever to pledge that of the plaintiffs. But, instead of pledging that over which they had no authority, they pledged that which belonged to the plaintiffs, and the present defendants, who took that pledge, took it at the

peril of the want of authority in the person making it. For these reasons, I am of opinion, that the defendants had no right to dispose of the warrants in question, and that the action of trover is maintainable.

HOLROYD, J. I am also of opinion that the plaintiffs are entitled to recover the amount of their claim in the present action. It is clear, that originally the brokers had no right to pledge the share which the plaintiffs had in the cottons which were purchased. It is true, that they were purchased by the brokers as the property of Moon, they at first not knowing that the plaintiffs had any interest in them. All the purchases, however, were, in point of law, made on the account of Moon and the plaintiffs, for Moon and the plaintiffs had agreed that the purchases should be made on their account, and the plaintiffs having paid their moiety of the purchase-money, had an interest and property in one moiety of the goods. Having that property, the brokers, whether they supposed Moon to have the sole property or not, could not, in point of law, by the direction of Moon, pledge that which was the property of the plaintiffs. But an objection is then made to the form of the action on this ground, that the plaintiffs and Moon having originally been tenants in common, the pawnee is now tenant in common with the plaintiffs, and consequently, an action of trover is not maintainable. The case of *Jackson v. Anderson*, 4 Taunt. 24, goes strongly to show, that there was not such a joint tenancy, or tenancy in common in this case, as to prevent the plaintiffs from maintaining trover. I am, however, not quite satisfied upon that point, but my opinion proceeds upon the second point. In this case, all the acceptances for the 20,000*l.* which were prior to the divison of the warrants, were duly paid at maturity, and the whole of that debt was extinguished. Now, after the division of the warrants had taken place, the parties ceased to be tenants in common, if they ever were such, and Moon had a separate property in one half of the goods, and the plaintiffs a separate property in the other half. That being so, I think it perfectly clear, that the brokers had no right to pledge the warrants which had thus become the property of the plaintiffs, that the defendants had no lien at all on those warrants, and, of course, that the objection as to the form of the action does not apply.

BEST, J. I am of the same opinion. It appears to me, that, from the commencement, this was the joint property of Moon and the plaintiffs; and if Moon were even a partner with the plaintiffs in this particular transaction, I am of opinion, that he had no right to pledge the property. A partner in a trading concern generally may dispose of the partnership property, because his authority to do so is implied from the nature of the business; but that by no means extends to a case of a partnership in a particular instance. Partners in a trading concern are joint tenants as to the partnership property. In this case the plaintiffs and Moon were at most only tenants in common. Now, one joint tenant may lawfully dispose of the whole interest; but one tenant in common cannot do so. If the whole property had been in this case sold by Moon himself, I am of opinion that the property of the plaintiffs would not have been bound, unless it were a sale in market overt, and such a

sale becomes binding, not by the authority of the persons selling, but from the general policy of the law. But this is not a sale at all, but a pledge. In cases of sale in market overt, you look to the property, but in those of sale out of market overt, the principal of caveat emptor applies; and in the case of a pledge, the responsibility of the pawner must be relied upon, and if he has no authority, the pledge is not available. I am of opinion, that this being the property of the plaintiffs, neither Moon and Co., nor their brokers, could by any act of theirs, convey the plaintiffs' interest in the property to the defendants. It is said, however, that although they could not convey the plaintiffs' interest, they could still convey their interest as tenants in common, and if so, that the defendants are now tenants in common with the plaintiffs, and that upon that ground the present action is not maintainable. The case of *Jackson v. Anderson*, is an authority to show that Moon and the plaintiffs were not tenants in common. The ground, however, upon which I am best satisfied to found my judgment is, that the tenancy in common in this case was completely determined, and that afterwards the separate interest of the plaintiffs was ascertained, the whole of the hills were given up and a new pledge made; and then that was an entirely new transaction, and when it took place, the first debt was extinguished, and the brokers had no authority whatever to convey the separate property of the plaintiffs. Upon this latter ground, I am clearly of opinion that the plaintiffs are entitled to recover.

Judgment for the plaintiffs.*

* This case was afterwards turned into a special verdict. Vide *Raba v. Ryland*, Gow's N. P. Rep. 102, and *v. Tupper Haythorne*, *ibid*.

DOE dem. EDWARD HUMPHREYS v. ROBERTS.—p. 407.

A. by his will, devised all his messuage or dwelling house, with the appurtenances, in High street, in the town of H., and all and every his buildings and hereditaments in the same street to his mother for life, and after her death to C. D. A. had only one house in the High street, but behind that house he had two cottages fronting a lane called Bakehouse Lane. There was no thoroughfare through that lane, the only entrance into it being from the High street: *Held*, that the two cottages passed under the will.

EJECTMENT for premises in the parish of Holywell, in the county of Flint. Plea, not guilty. The cause was tried before GARROW, B., at the last assizes for the county of Salop, and the question was whether certain premises, situate in Bakehouse Lane, in the town of Holywell, passed under the will of Thomas Humphreys, under which the lessor of the plaintiff claimed. The will was dated the 5th June, 1775, and recited a marriage settlement, on the marriage of the testator, by which all the messuages, lands, or tenements, belonging to the testator, or his mother, Mary Humphreys, situate in the county of Flint, were settled after his decease, in default of issue by his wife, and subject to two annuities to his mother and his wife for life, to the use and behoof of

himself, his heirs and assigns for ever. The will then recited that he had not any issue by his wife, and proceeded as follows: "Now I do give and devise all the said capital and other messuages, tenements, lands, hereditaments, and premises, with their appurtenances, in manner and form following, that is to say, as to and concerning all that messuage or dwelling house, with the appurtenances, situate in High street, in the town of Holywell, in the said county of Flint, wherein my said mother inhabits, and nearly opposite to the White Horse Inn, together with the shop adjoining the same messuage; and all and every my buildings and hereditaments *in the same street*, I do give and devise the same unto and to the use of my said mother, Mary Humphreys, for her natural life." The testator then after declaring that the premises last mentioned were to be exempt from the annuities to his mother and his wife, which he charged upon the residue of his estate, devised all the other lands comprised in the marriage settlement, except the premises limited to his mother for life, to trustees, for 500 years; in trust, to sell or mortgage the same, in order to pay his debts, and certain legacies mentioned in the will; and then, as to all his estate, as well that which was subject to the trust term of 500 years, as what was limited to his mother for life, from and immediately after her decease, he devised the same to his brother, John Humphreys, for life, and after his death to his sons and daughters in tail, with remainder to Hugh Humphreys for life, and his sons and daughters in tail, with remainder to Edward Humphreys for life, &c. The testator died in 1788, his mother, Mary Humphreys, having died in his lifetime; John Humphreys and Hugh Humphreys, his brothers, died without issue; and Edward Humphreys is the lessor of the plaintiff. The trustees for the term of 500 years had sold, in June, 1790, the house in High Street and the two cottages in Bakehouse Lane, to one S. Davies; the latter sold them to David Pennant, under whom the present defendant occupied one of the cottages. In another ejectment tried at the same assizes, with respect to the house in High Street which nearly fronted the White Horse Inn, it was admitted that the lessors of the plaintiff were entitled to recover. Bakehouse Lane contains thirty houses, belonging to several owners, and though not a thoroughfare, is wide enough to admit carriages; the entrance thereto is out of High Street, under an archway, a little below the house in High Street. The cottages are situate in Bakehouse Lane, on the opposite side of that lane, fronting the back of the house in High Street, having that and the other houses in High Street interposed between them and the White Horse Inn. The testator had no other premises in or near High Street. The learned Judge was of opinion, that the two cottages passed under the will, and he directed the jury to find a verdict for the plaintiffs, with liberty to the defendant to move to enter a nonsuit; a rule nisi for that purpose having been obtained in last Michaelmas term.

W. E. Taunton showed cause. It is quite clear, that the testator did not intend that his devise should be confined to those premises which were occupied by his mother; if such had been his intention, why should he add to the description of those premises the words which

immediately follow, "all and every my buildings and hereditaments in the same street." In order to ascertain the testator's meaning, it is material to refer to other parts of the will. It begins by reciting the testator's marriage settlement, by which some property of his mother's as well as his own was settled to certain uses; he next mentions his intention to dispose of the whole of that property, and then introduces the clause in question as to a part of it, which clause is followed by a disposition of the residue to other uses. It appeared that there was no other street to which the two cottages in question could be said to belong, except the High-street.

Puller and R. V. Richards. The description of premises in the will of T. Humphreys is extremely minute, and ought not to be enlarged. *Ewer v. Hayden*, Cro. Eliz. 476, 658, *Blague v. Gold*, Cro. Car. 447, *Tuttlesham v. Roberts*, Cro. Jac. 22, are in point. *Doe v. Collins*, 2 T. R. 498, does not apply, there all the premises had been occupied with the house devised. This court was well known by the name of Bakehouse-lane; that, therefore, would have been the proper description of the premises. [ABBOTT, C. J. Suppose a man, having no house in the High-street, devised his house in the High-street, if he had a house in this Bakehouse-lane, would not that pass?] It would; but if a man, having one house in High-street and another in the lane, devised *all his houses* in High-street, the one would pass, but the other would not. The general words "all my buildings, &c.," were introduced for the purpose of securing more effectually to the devisee the premises before particularly described. *Doe dem. Tyrrell v. Lyford*, 4 M. & S. 550, is in point, to show that the Court cannot receive extrinsic evidence to give effect to a will, where it can have an effectual operation without it. [BAYLEY, J. The true ground of that decision was, that there, there was property to satisfy the will. But what *other* buildings are there in High-street to satisfy the will in this case, besides the capital messuage occupied by the mother?] The expression is not *other* buildings, but *all my buildings*. [BAYLEY, J. The word *and* is accumulative. ABBOTT, C. J. The appurtenances to the principal messuage are described as being in the High-street; how were they situate?] They did not abut on the High-street, but were behind the house.

ABBOTT, C. J. Upon the words of the will, there appears to have been an intention to pass all that the testator had in the High Street; and he seems to have thought, that he had something more than the principal messuage in the occupation of his mother. In fact, however, he had no premises in that street except the principal messuage, unless these cottages are to be considered as coming within the description. There was no other street to which they could be said to belong. I think, therefore, that they passed by the will. The rule for entering a nonsuit must therefore be discharged.

BAYLEY, J. In cases of this kind, we should endeavour to discover the meaning of the testator. If the description is precise, and there are premises to satisfy it, and there are other premises also, there the others will not pass. If, however, the description is not precise, if you

cannot satisfy the will, unless additional property passes besides that which is described, then you must presume, that the testator intended to pass that property, and that his description is inaccurate. Here, after mentioning the capital messuage, the testator adds, all and every my buildings in the said street. He had no other property fronting the High Street, but had other property to which there was no access but from that street. I think, therefore, that the testator's meaning is to be extended beyond the words, "in that street," and that the cottages in the court passed by the will. This rule must therefore be discharged.

HOLROD, J. In this case, I think that the testator intended to pass the cottages in question, and that the words in his will are sufficient for that purpose. He speaks of some other tenements in the High Street besides the principal messuage. The only way to these cottages was through the High Street, and there was no thoroughfare through Bakehouse Lane. If there had been an opening from the High Street to these two cottages alone, they would clearly be in the street, and I can see no difference from the circumstance of there being other houses in the court. And as there is no other property to satisfy the will, I am of opinion that these cottages ought to pass. The rule for entering a nonsuit must be discharged.

Rule discharged.*

* Best, J., was sitting at Chambers.

REX v. The Inhabitants of CHIPPING-NORTON.—p. 412.

An indenture of apprenticeship, executed before the passing of the 44 G. 3, c. 98, must be stamped with the premium stamp within the time prescribed by the statute 8 Anne, c. 9, and where such an indenture was stamped at the time of its being produced in evidence, with the stamp required by the 55 G. 3, c. 184, but not within the time prescribed by the statute of Anne: *Held*, that the indenture was wholly void, and the pauper by serving under it, gained no settlement.

UPON an appeal against an order of two justices, whereby Jane Eely, widow, and her six children, were removed from the parish of Aynho, in the county of Northampton, to the parish of Chipping Norton, in the county of Oxford; the sessions confirmed the order subject to the opinion of the Court on the following case:

By an indenture of the 30th October, 1794, William Eely, the late husband of the pauper, Jane Eely, and the father of her children, not being then settled in the parish of Chipping Norton, bound himself to serve R. Phillips, of Chipping Norton, as an apprentice for seven years, and R. Phillips, in consideration of 25*l.*, the sum given with the apprentice, covenanted to instruct him in the business of a cooper. The indenture was duly stamped, with a stamp denoting the payment of the several duties, amounting in the whole to six shillings, imposed by different statutes upon the indenture itself; but it was not stamped with any stamp in respect to the premium, as required by the statute 8 Anne, c. 9, within the time required by that statute, nor until the making of the order of removal, and after the entering of the appeal

against the order. Before the hearing of the appeal, the indenture was stamped, upon the payment of 5*l.* penalty, and of 1*l.*, with a stamp denoting payment of a duty of 1*l.*, being the *ad valorem* duty stamp used to denote the payment of such duty under the 55 Geo. 3, c. 184, and 1*l.*, being the duty payable under that statute, in respect of a premium of 25*l.* given with an apprentice. The duty payable in respect of the like premium under the 8 Anne, c. 9, was twelve shillings and sixpence only, the duties payable under both the last-mentioned statutes were, after they were paid into the exchequer, applicable to the same purposes. The stamps used by the commissioners, under the 55 G. 3, c. 184, are of a different sort from those which were required to be procured, and used by the statute 8 Anne, c. 9, which were poundage stamps. These stamps were used until the passing of the 44 G. 3, c. 98; which imposed an *ad valorem* duty, and the poundage stamps were disused, and the dies with which they were formed were then broken up, and are not now in existence. William Eely served under the indenture in Chipping Norton, until the expiration of seven years from the date thereof.

Holbeck and *Marriott*, in support of the order of sessions. A good settlement was gained by the service under this indenture, although it was not stamped at the time of the service, nor until after the order of removal. Before the 44 Geo. 3, c. 98, an indenture of apprenticeship required two distinct stamps, a deed stamp and a premium stamp, and this indenture was granted before the passing of that statute, and therefore required two stamps. By the 37 Geo. 3, c. 136, s. 2, the commissioners are authorized to stamp instruments after they have been executed, on payment of the duty and a penalty, and then the instrument so stamped is to be of equal force and validity as if it had been stamped in the first instance. Here the instrument has been stamped. The words of the 55 Geo. 3, c. 184, s. 10, are very comprehensive; besides, it is sufficient if the instrument is properly stamped at the time it is produced in evidence. *Wright v. Riley*, Peake, N. P. 173, *Burton v. Kirkby*, 7 Taunt. 174, *Roderick v. Hovill*, 3 Campb. 103, proceed on the particular provisions respecting policies of insurance in which the commissioners are prohibited from subsequently stamping the instruments. *Edwards v. Dick*, 4 Barn. & A. 212, shows that the Court will consider what was the object of the legislature, though the act pronounces an instrument void to all intents and purposes.

Finch, contra, was stopped by the Court.

ABBOTT, C. J. I am of opinion that this indenture was void, not having been stamped within the time required by law, and consequently, that the pauper gained no settlement by serving under it. By the statute 8 Anne, c. 9, s. 32, a premium stamp is imposed, and by s. 36, indentures signed within the limits of the weekly bills of mortality, were required to be stamped within one month after the date, and by s. 37, every indenture entered into elsewhere in Great Britain, shall be either stamped within two months, or brought within that time to some collector or officer appointed for the management of these duties, who shall endorse a receipt for the duty paid, bearing date on the day

of payment. By s. 88, indentures executed within 50 miles, to be computed from the limits of the weekly bills of mortality, shall be stamped within three months, and if at a greater distance, within six months after the date of making thereof. By s. 89, all indentures not stamped within the respective times for that purpose limited by the act, are declared void, and not available in any court or place, or to any purpose whatsoever. Here, therefore, the legislature expressly requires that the instrument shall be stamped within the prescribed time, and declares that, in case of omission, it shall be void to all intents and purposes, and that forms a distinction between this case and those that have been cited in argument. The order of sessions must therefore be quashed.

Order of Sessions quashed.

POWNALL v. MOORES.—p. 416.

A covenant by a lessee that he will sufficiently muck and manure the land with two sufficient sets of muck within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenant's laying on two sets of muck within the three last years of the term.

COVENANT. Declaration stated that one Hugh Pownall, being seized in his demesne, as of fee, on the 8th March, 1808, by indenture of lease demised to the defendant, amongst other premises, a meadow called the Pinfold Meadow, to hold for the term of 16 years. The declaration then stated a covenant by the defendant, "that he should and would sufficiently muck and manure the said field, called the Pinfold Meadow, with two sufficient sets of muck, within the space of six of the last years of the said term, the last set of muck to be laid upon the said premises within three years of the expiration of the said term." The declaration then stated the entry of the defendant upon the premises, deduced a title to the plaintiff as assignee of the reversion, and alleged as a breach, that the defendant had not manured the said Pinfold Meadow according to the said covenant; but on the contrary, that although the three first years of the last six years had elapsed, and considerably less than three years of the term was all that remained, yet the defendant had not laid any manure at all upon the said meadow. The defendant pleaded, that the said term of 16 years, of and in the said demised premises, was still unexpired. General demurrer and joinder.

D. F. Jones, in support of the demurrer. The question intended to be raised, is whether the defendant, upon the true construction of the lease in question, can satisfy the covenant into which he has entered, by laying two sets of manure upon the meadow *at any time within the last six years*. The intention of the parties appears to have been, that one set of manure should be laid within the first three, and the other set within the last three of the last six years. It is true, that the terms of the covenant are not expressed with exactness; but the Court will give them a reasonable construction, and in case of ambiguity, will,

according to the general rule, take the words most strongly against the covenantor. The course of good husbandry requires, that the meadow should be kept in heart by manuring every three years, and this must have been what the parties had in contemplation. The object was, not merely that the land should be *left* at the determination of the lease with a sufficient quantity of manure then upon it, but that it should be *kept* in a good state of husbandry from time to time during the lease. From its being expressed, that the last set of manure was to be laid on within the last three of the last six years, it is not too much to infer that the meaning of the covenant was, that the first set of manure should be laid on within the first three of the last six years. If a different construction prevail, the lessee may then protect himself by laying on both the sets of manure within the last six months of the term, the effect of which would be evasive of the spirit of the covenant, and would also be contrary to the course of good husbandry, and injurious to the land.

Creswel, contra, was stopped by the Court.

ABBOTT, C. J. The lessee has only covenanted, that he will lay on two sets of manure within the last six years of the term, and that at least one of those sets should be laid on within the last three years of the term. The object of the last mentioned stipulation was, that all the benefit of the manure should not be exhausted during the lessee's holding, but should at least partially continue at the expiration of the term. But the lessee has nowhere restricted himself from laying on both the sets of manure within the last three years, if he should think proper, and we cannot by construction bind him beyond the terms of his covenant.

BAYLEY, J. If the plaintiff intended to draw any argument from the course of good husbandry, an allegation to that effect should have been introduced upon the record. But in truth, no such allegation could have availed to extend the covenant in question in the way which is now suggested.

HOLROYD, J., and BEST, J., concurred.

Judgment for the defendant.

BIRD v. PEGG and Another.—p. 418.

Where judgment of nonsuit had been given in an action brought against an infant, it is no ground of error that the infant had appeared by attorney.

UPON a writ of error brought to reverse a judgment of non-suit in the Court of Common Pleas, it appeared upon the record, that the defendants below, had appeared by attorney. The error assigned was, that one of the defendants, at the time of his appearance, and at the time of giving judgment, was an infant under the age of 21 years. *Comyn*, for the plaintiff in error, contended, that this was a good ground for reversing the judgment, although it was in favour of the

infant. In *Bird v. Orms*, Cro. Jac. 289, an entire judgment against two was reversed, on the ground, that one was an infant and appeared by attorney instead of guardian, and he referred to Serjt. Williams's note to the case of *Foxtwist v. Tremaine*, 2 Saund. 212 a, where several authorities on the subject are collected.

ABBOTT, C. J. There can be no doubt, that where judgment is given against the infant, he may assign his appearance by attorney as a ground of error. The law will protect an infant where a judgment has been recovered against him; but the circumstance, that the plaintiff below has been defeated in his claim against an infant, shows that he had no cause of action whatever, and therefore, that he is not entitled to judgment. It would be greatly to the prejudice of the infant, to allow the plaintiff below to avail himself of the infant's appearing by attorney as a ground of error. Unless, therefore, there be some decided case in which judgment given in favour of an infant defendant has been reversed on the ground of his infancy, we are of opinion that this judgment ought to be affirmed.

Comyn admitted that he could not then cite any such case, but he requested further time to look into the authorities, and afterwards informed the Court, that upon search, the only authorities he could find were cases in which the original judgment had been obtained against the infant.

Judgment affirmed.

REX v. TOWNSEND.—p. 420.

By a clause in an inclosure act, a commissioner was authorized to stop up any way, provided it be done by the order, and with the concurrence of two justices, and that order was to be subject to an appeal in like manner and under such form and restrictions as if the same had been originally made by such justices. By a subsequent clause, any party aggrieved was to be at liberty to appeal at any time within six months after the cause of complaint. Under this act, the commissioner, with the concurrence and order of two justices, stopped up a road without giving the public notices required by the 55 G. 3, c. 68: *Held*, that a party aggrieved, might, under these circumstances, appeal at any time within six months.

Quere, whether it be necessary to give such notices where roads are stopped up under the provisions of an inclosure act?

By 55 G. 3, c. 43, s. 15 (an act passed for enclosing lands in the parish of Hartlebury, in the parish of Worcester), the commissioner thereby appointed was authorized to stop up, alter, or change any old carriage road, bridle way, or footpath, passing or leading through any of the old enclosures within the said parish, provided that no such carriage road, bridle way, or footpath, leading through any of the old enclosures of the said parish, should be stopped up, altered, or changed without the concurrence and order of two justices of the peace, and which order should be subject to an appeal to the quarter sessions for the county of Worcester, in like manner, and under such forms and restrictions as if the same had been originally made by such justices. By section 36, any person thinking himself aggrieved by anything done in pursuance of the act, was to be at liberty to appeal to the

general quarter sessions of the peace, which shall be holden for the county of Worcester, within six months next after the cause of complaint should have arisen. Under this act the defendant was appointed commissioner, and on the 17th August, 1820, made an order with the concurrence of two justices of the peace for the county of Worcester, for stopping up a certain footpath leading through the old enclosures. Against this order, one S. Bateman appealed at the Epiphany sessions, 1821, and the order was quashed. It was contended on behalf of the defendant at the sessions, that the court had no jurisdiction, because, by the 55 G. 3, c. 68, an appeal against a similar order of two justices must be to the next sessions, but the counsel for the appellant urged, that the quarter sessions had jurisdiction, unless it could be shown, that due notices of the order for stopping up the footway had been given, as required by the 55 G. 3, c. 68, previously to the Michaelmas sessions, 1820; and the court of quarter sessions required the defendant to prove, that such notice was given previously to those sessions, and that not being proved, they heard the appeal and quashed the order. This order of sessions having been moved into this court by certiorari, a rule nisi was obtained for quashing it, for insufficiency, on the ground, that the appeal ought to have been to the Michaelmas sessions.

Campbell now showed cause. The appeal against this order is governed by the same rules as if it were an original order of magistrates for stopping up or diverting a footpath. It was finally settled in *Rex v. Justices of Staffordshire*, 3 East, 151, that, under the general highway act, 13 G. 3, c. 78, such an appeal must be to the next sessions after the order made, whether any notice was given or not. This operated as a great hardship upon individuals aggrieved by the order, who might not have any notice; and the 55 G. 3, c. 68, s. 2, which passed the same day as the Hartlebury enclosure act, requires, in the case of stopping up any footway, that a notice shall be affixed by the side of the way, &c., and also inserted in a county newspaper for three weeks after the making of the order, and that a like notice shall be affixed to the door of the parish church, on three successive Sundays, and then that the order shall, at the quarter sessions which shall be holden next after the expiration of four weeks from the first day on which the notices shall have been published, be confirmed; and then, by sect. 3, an appeal is given to any party aggrieved at the said quarter sessions. Now, as in this case no notices of the order for stopping up the way were given before the Michaelmas sessions, the appeal to the Epiphany sessions was therefore in time. Besides, at any rate the appeal was in time within the 36th section of the local act, which allows it at any time within six months after the party was aggrieved. Here the order was made on the 7th August, and the footpath, in point of fact, was not stopped up till October.

W. E. Taunton and Puller, contra. This is not a proceeding under the highway act, but the road was here stopped up by a commissioner, under an enclosure act. The highway acts have no relation to the proceedings under enclosure acts, and therefore the notices required by those acts for stopping up roads, are wholly inapplicable to such a case as the present. It certainly has not been usual, where roads have

been stopped up under enclosure acts, since the passing of the 55 G. 3, c. 68, to give the notices required by that act. If in this case such notices were necessary, no road, under an enclosure act, has been legally stopped up since June, 1815. Besides, if an enclosure commissioner be bound by part of the 2d section of 55 Geo. 3, which relates to notices, he is equally bound by the other part, which prescribes, that the justices shall make the order, upon view, and at a special sessions, but the commissioner cannot compel the justices to take a view, or to hold a special sessions, or to give the proper notice thereof, which is necessary. *The King v. Justices of Worcestershire*, 2 Barn. & A. 228. The appeal can only be under section 15 of the local enclosure act, according to the rule of construction, "that subsequent clauses which are general, shall, in deeds, be governed by precedent clauses which are particular." *Thomas v. Howel*, 4 Mod. 69. *Altham's case*, 8 Rep. 308. The 36th section, then, is wholly out of the case here. The 15th section is nearly copied from the appeal clause in the general enclosure act under which the appeal must have been to the next sessions.* But if an appeal conformable to the 15th section was impracticable, in consequence of an alteration effected by 55 G. 3, c. 68, it follows that there could be no appeal at all, and the sessions had no jurisdiction.

ABBOTT, C. J. I am of opinion that this rule ought to be discharged. By the 15th section of the enclosure act, the appeal is to be to the quarter sessions, in such manner and under such forms and restrictions, as if the order had been originally made by two justices. The act clearly contemplates an order afterwards to be made. To what sessions then must the party have appealed, if the original order for stopping up the road had been made by two justices? By 55 G. 3, c. 68, the appeal against such an order must have been not to the next quarter sessions after making the order, but to the sessions that should be holden next after the expiration of four weeks from the first day on which the notices therein required were published. In this case no notices were ever published, and, therefore, if the order in question had originally been made by two justices, the appeal could not have been to the Michaelmas sessions. The mode of appeal therefore pointed out in the 15th section was rendered impracticable, by the omission to give the notices required; but notwithstanding that omission, a party might be aggrieved by the stopping up of the road; and yet, according to the argument, if the 36th section is to be controlled by the 15th, he could have no appeal whatever, until the notices were published, which might not happen. I do not, however, mean to pronounce any decision, whether it be incumbent upon a commissioner, in the case of stopping up a way, under an enclosure act, to give the notices required by the 55 G. 3, c. 68. But at all events, those notices not having been given in this case, I am of opinion, that the mode of appeal pointed out in the 15th section having become impracticable, the party aggrieved was entitled to appeal, at any time within six months. This rule, therefore, must be discharged.

Rule discharged.

* 41 Geo. 3, c. 109, s. 8.

Sir THOMAS STANLEY, Bart., v. FIELDEN, Esq., CONGREVE, Esq., and TOPHAM.—p. 425.

Two magistrates authorized the surveyor of a turnpike road which ran through twenty-nine townships, to collect for the repair of the road a composition in lieu of the statute duty. The surveyor was not examined upon oath as to the necessity of the composition. He afterwards made an assessment of six-pence in the pound upon the annual value of the lands of a particular township through which the turnpike road passed. The sum to be collected under the assessment was the utmost which the surveyor of the turnpike roads could in any case demand from the inhabitants of the township, and much exceeded what was required to put that part of the road lying in the township, into complete repair. The turnpike surveyor having returned the assessment to the surveyor of the highways of the township, directed him to collect the sums therein mentioned. Upon a refusal to pay the sum assessed by an inhabitant of the township, two magistrates granted a warrant of distress to levy the same: *Held*, that the warrant was bad, the magistrates having no jurisdiction whatever, upon the ground that, in order to legalize the demand under the assessment, it ought to have been previously ascertained how many days statute duty would be required to put the road into complete repair, the composition being demandable only in respect of that number of days statute duty.

Semble, that in order to justify two magistrates in granting an authority to collect a composition in lieu of statute duty, it should be made to appear upon oath, to both the magistrates present, that the road can be more effectually repaired by such composition.

Semble, also, that where the composition is to be collected in several townships, it ought to appear on the face of the authority itself, that, in the judgment of the magistrates, a composition, in lieu of statute duty, is advisable in each particular township.

TRESPASS for seizing and taking the plaintiff's oxen, and detaining them for two days, until the plaintiff paid 31*l.* 5*s.* to regain them. Plea 1st, not guilty; 2dly, justification under a warrant of distress, to levy the sum of 29*l.* 5*s.*, due from the plaintiff, which had been assessed upon and demanded of him, as a composition in lieu of the statute duty that he was liable to perform, as occupier of lands in the township of Hooton. Replication, that the defendants committed the trespasses of their own wrong. At the trial at the spring assizes for the county of Chester, 1821, it appeared that the cattle, for the detention of which this action was brought, were seized by the defendant, Topham, under a warrant of distress, granted by Fielden and Congreve, who were magistrates acting for the hundred of Wirral, in the county of Chester. The warrant was to levy a sum of money for the proportion of statute duty due from the plaintiff, as owner of lands in the township of Hooton. It was given in evidence on the part of the plaintiff, and was as follows: "Whereas, by an assessment made upon the occupiers of lands, &c., within the township of Hooton, in the district and hundred of Wirral, in the county of Chester, for the purpose of raising a composition in money, in lieu of the statute duty in kind, for the maintenance and repair of such part of the road and highway leading from the city of Chester, to the Woodside Ferry, in the township of Birkenhead, in the county of Chester, as is situate within the township of Hooton, pursuant to an order or authority of two justices, acting for the said district and hundred, for that purpose, according to the directions of the statute in that behalf: Sir T. Stanley, Bart., was charged

the sum of 29*l.* 5*s.*, as his share and proportion of the said assessment, in respect of the lands, &c., which he occupied within the township of Hooton; and whereas, it appearing to R. Congreve and J. Fielden, Esqrs., being justices of the peace, for the county of Chester, acting for the district and hundred of Wirral, upon the application of J. Johnson, one of the surveyors of the highways of the township of Hooton, that the said sum of 29*l.* 5*s.* had been duly demanded from the plaintiff, and that he had refused to pay it for the space of ten days after such demand made: they, the said R. Congreve and J. Fielden, did summon the said Sir T. Stanley personally to appear before them and other justices, to be assembled at a special sessions to be holden for the said district, and at a place and time therein mentioned, to show cause why he refused to pay the said sum; and whereas at a special sessions, now holden for the hundred of Wirral, at the place therein mentioned, before them, the said Sir T. Stanley had not appeared, pursuant to the summons, they, the said J. Fielden and R. Congreve, adjudged him liable to pay the said sum, and therefore, they commanded all constables, &c., to levy the same by distress, &c., together with the expenses of the distress. It was objected by the counsel for the defendants, on the plaintiff's case being closed, that there ought to be a nonsuit, inasmuch as the warrant must be considered *prima facie* evidence of all the facts therein stated, and if so, then it appeared, that by an assessment pursuant to an order of two justices, according to the directions of the statute, the plaintiff was charged with the sum therein mentioned, and refused to pay it, and that this must be taken to be an adjudication, binding and valid, until regularly quashed. The learned Judges refused to nonsuit the plaintiff, but reserved the point, and the cause proceeded. On the part of the defendants the following facts were proved. Crackenthorpe, the surveyor of the turnpike-road, between the 29th September and 8th October, 1819, applied to the clerk of the magistrates for an authority, in writing, to empower him to call for a composition in money, in lieu of the statute duty. On the 8th October, a special sessions were held, at which Congreve, one of the defendants, and William Wilson Currie, acting justices for the district of Wirral, attended, and Crackenthorpe, the turnpike surveyor, was present, but was not examined upon oath or otherwise; and then Congreve and Currie signed the following authority in writing. "It having been made appear to us, two of his Majesty's justices of the peace, acting within and for the district and hundred of Wirral, in the county of Chester, by Harvey Crackenthope, the surveyor of the turnpike-roads from the city of Chester to the Woodside Ferry, in the township of Birkenhead, in the county of Chester, and from the said city to the Assembly House in Park Gate, in the township of Great Neston, in the said county, and from Great Neston to Woodside Ferry, and from the road leading from the city of Chester to Park Gate aforesaid, to the road leading from the same city to the said Woodside Ferry, that the maintenance and repair of the said roads can be more effectually carried on by a composition in money than by a performance of the statute duty in kind; we do hereby authorize the said Harvey Cracken-

thorpe to require such composition, in money, in lieu of the whole statute duty, from the several persons who are bound by law to perform such statute duty ;” and they fixed the rates of composition, for a cart and three horses, one driver, and one labourer, by the day, at 8s. 4d. On the 12th October, 1819, Johnson, the surveyor of the highways of the township of Hooton, received from Crackenthorpe, the surveyor of the turnpike-road, a demand in writing of a list of the several persons liable to statute duty in that township, and an account of the yearly value of the lands, &c., which they respectively occupied. On the 27th October, Johnson returned the list required to Crackenthorpe, and in that return the plaintiff was mentioned as the owner and occupier of lands and tithes of the yearly value of 1170*l*. The turnpike surveyor then made an assessment upon the whole annual value, of 6*d*. in the pound, the plaintiff’s proportion of which was 29*l*. 5*s*. This assessment was made on the assumption that three days’ statute duty was required to repair the roads in the township.* The whole line of road, for the repair of which the composition was required, was forty miles in extent, and passed through twenty-nine townships. At the time the demand was made upon the plaintiff, that part of the turnpike-road which passed through the township of Hooton, and which was only fifty-nine yards in length, was in perfect repair, and in March, 1820, the turnpike surveyor offered to return 26*l*. of the sum levied, and stated at the time, that in the course of that year only 3*l*. had been expended in repairing the road in that township. Mr. Currie, the magistrate, who, as well as the defendant Congreve, had signed the authority to collect the composition, proved, that he had frequently conversed with Crackenthorpe on the necessity of having a composition before the authority was signed, and that he had desired the clerk to the magistrates to come prepared with an authority, that he had expressed his approval of the measure, that he had frequently conversed with Congreve, and that they were agreed upon the expediency of the measure ; the subject was within their own knowledge, and they therefore signed the authority. Upon these facts the Chief Justice stated to the jury, that upon the evidence, it had not been made to appear by the surveyors of the roads to the justices, that a composition in lieu of statute duty was necessary ; that the surveyor ought at all events to have been examined in the presence of both the magistrates, whereas in fact one only had examined him, and communicated the information to the other ; and as the result of the inquiry was to affect the property of many persons, it was fit that (if not on oath) it should at least be of a satisfactory nature. The jury found a verdict for the plaintiff. A

* By the 54 Geo. 3, c. 109, s. 5, the rate of composition, in lieu of statute duty, for every twenty shillings annual value, is to be a fiftieth part of the sum fixed by the justices as the composition for one day’s labour of a cart and three horses and two able men. In this case that sum was eight shillings and four pence, of which two pence was the fiftieth part ; and the whole statute duty being six days for every 50*l*. annual value, one shilling in the pound would be the sum required. But by the local turnpike act, the trustees of the turnpike-road were entitled to require only three days’ statute duty from the several townships through which the road ran, the composition for which would, of course, be sixpence in the pound.

rule nisi for a nonsuit or a new trial having been obtained by *J. Williams* in last Easter term; first, upon the ground taken at the trial, that the warrant contained *prima facie* evidence of the jurisdiction of the magistrates, and therefore, that there ought to have been a nonsuit. Secondly, that there was evidence given on the part of the defendant, to show that it had been made sufficiently to appear to the justices by the surveyor, that a composition was necessary instead of statute duty: and thirdly, that at all events the defendant Fielden was entitled to a verdict, inasmuch as he had not signed the authority to the surveyor to collect the composition, but merely the warrant, and that he was justified in so doing, by the documents referred to in the warrants. At the time of granting the rule, the Lord Chief Justice said, that it was important that justices should know the mode in which they are to exercise their authority. At the same time, the opinion of the Court was then very strong, that wherever an act of parliament required justices to take certain steps on some matter being made to appear to them, that matter must be made to appear to them on oath.

Cross, Serjt., now showed cause. The warrant which was given in evidence on the part of the plaintiff, merely to connect the justices with the act of the officer, cannot be taken to be in itself an adjudication, and there was not any other formal adjudication. Besides, the warrant itself was a nullity, inasmuch as in order to give jurisdiction to the two justices who signed the authority, it should have been "*made to appear*" to them in a formal manner, that the maintenance and repair of the roads could be more effectually carried on by a composition in money, than by a performance of the statute duty in kind. Now, that "making to appear" should have been upon a regular information laid before the justices; and, secondly, by the examination of witnesses upon oath. In the present instance, there was neither information nor oath. The whole proceeding therefore was *coram non judice*, and the order by the two justices being without jurisdiction, could be no justification to the two defendants who signed the warrant. The distress was also illegal upon another ground. Supposing this to have been a case in which it was proper to have a money composition in lieu of statute duty in kind, it was necessary first to ascertain what quantity of statute duty in kind would have been necessary under the circumstances. Although the act of parliament fixes a maximum, yet it does not appear what smaller proportion of the statute duty might have been sufficient, and the first step should have been to have settled that amount.

D. F. Jones and *J. Parke*, in support of the rule. There is no ground whatever for maintaining the verdict, as against Fielden. By the acts of parliament it is not required, that the justices signing the warrant should be the same justices as those who signed the original authority; and, in the present instance, Fielden had not, in fact, interfered in any antecedent stage of the proceedings; he was justified in presuming that the previous measures were correct in point of form, the plaintiff having never appealed, though a demand had been formally made upon him, and also a summons issued, to which he did not appear.

It would be too much to make Fielden responsible for signing the warrant, even supposing that the justices who signed the authority had acted upon imperfect or informal evidence. He was not bound to inquire upon what evidence they had acted, nor had he the power, in point of law, of quashing or revising their adjudication. But, secondly, the verdict ought not to stand against *either* of the defendants. The warrant which was proved on the part of the plaintiff entitled the defendants to a nonsuit. It imports an adjudication, such as the statute required; and an unimpeached subsisting conviction or adjudication cannot be questioned in the form of an action of trespass. *Massey v. Johnson*, 12 East, 67; *Strickland v. Ward*, 7 T. R. 681. Supposing, however, the warrant not to be conclusive as an adjudication, the proceedings which were given in evidence were sufficient to support it. The stat. 54 G. 3, c. 109, embodies the provisions of the 13 G. 3, c. 78, and, according to the 81st section of that statute, the plaintiff should have appealed, if there were any ground of complaint; and it is expressly provided, that no proceedings shall be quashed for want of form, or shall be removable by certiorari. If the plaintiff had appealed, he must have done so within a limited time, whilst the evidence was fresh, and the measures in the execution of the act were just commencing; whereas, if trespass can be maintained, no lapse of time will sanction the order of the justices. Upon an appeal, too, the plaintiff must have stated some specific objection, whereas, by the present action, he casts it upon the defendants to prove and maintain every step of the proceedings. As to the next point, it appears, upon the evidence, that information was laid before the magistrates by the surveyor, and it was not necessary, under this act of parliament, that there should be evidence upon oath. The very language of the act, which is, "*made to appear*," not "*proved*," as is found in other acts, seems to show, that the legislature did not intend to make it imperative upon the justices to require evidence upon oath; and the reason of the difference is apparent. That which was to be made to appear was not a simple matter of fact, as in ordinary cases, but was a matter of judgment, as to the expediency of having a money composition in lieu of statute duty in kind.

This was a matter of speculation, depending upon the state of the roads, the price of labour, the supply of materials, and, generally, the circumstances and state of the neighbourhood. In such a case, therefore, the justices were authorized in acting upon their own knowledge, or upon what appeared to them to be satisfactory information. Here, in fact, they had communicated together, and it was not necessary that the information of the surveyor should be laid before them whilst sitting together. They subsequently exercised a joint judgment, which was sufficient. *Batley v. Gresley*, 8 East, 327. But, supposing that the surveyor ought to have communicated his information to the two justices *together*, at most the order was not void, but voidable, and could only be avoided upon appeal. *Rex v. Inhabitants of Stotfold*, 4 T. R. 596. As to the last objection, it was clear, from the evidence, that the surveyor considered, that the whole statute duty in kind, which

by the act he was empowered to call for, was necessary for the repair of the main line of road, together with the lateral branches; and it is evident, that the amount of the composition in money was calculated upon that principle. If the demand was excessive, and not required by the state of the road, the plaintiff should have appealed: but, in the present stage of the proceedings, it must be taken that the whole of such duty, if performed in kind, would have been necessary, the calculation of the composition in money shows what was intended; the rate of commutation was regularly fixed by the justices, and promulgated according to the provisions of the act.

ABBOTT, C. J. I am of opinion that enough has not been done to legalize the demand of this specific sum of money from the plaintiff. It appears from the evidence, that there had been an adjudication of two magistrates that a composition should be paid in lieu of statute duty in kind, and also an adjudication by which the composition was fixed to be at the rate of 8s. 4d. for a cart, three horses, a driver, and a labourer. Before, however, it can be ascertained how much any individual ought to pay as a composition in lieu of statute duty, it must be ascertained in some manner and by some competent authority how many days' labour will be required to repair the road. Now, that certainly has not been done here, in distinct terms, in this case. It appears upon the evidence, that the turnpike surveyor having first required, from the surveyor of the highways of the township, a list of the several persons liable to statute duty, made an assessment at the rate of sixpence in the pound upon the whole annual value returned. He seems to have taken it for granted that he was entitled to require from the several townships through which the road passed, a composition for the whole statute duty which, by law, he was entitled to demand, whatever the state of the roads might be. Now, I am of opinion, that he had no such right. If there were no composition, the inhabitants of the several townships could only be called upon to do so many days' statute duty as would be absolutely necessary for the repair of the roads; and if a composition be called for instead of the statute duty, that composition ought to be an equivalent for that number of days' statute duty. I think, therefore, in this case, that before the demand was made upon the plaintiff, it ought to have been ascertained, by persons having competent authority for that purpose, that so many days' statute duty would be required to put the road in question into a complete state of repair, and that it ought to have been notified to the inhabitants of the parish or township, that the composition required of them, of sixpence in the pound upon the annual value of their lands, was calculated upon the principle that it would require so many days' statute duty to repair the road. That not having been done in this case, I think, that the justices had no authority whatever to issue the warrant, and consequently that this rule must be discharged.

BAYLEY, J. I am of opinion, that the verdict in this case is right, as against both the magistrates. A magistrate is not to be answerable for granting a warrant, if at the time of granting it he has documents before him (which are the acts of other magistrates) from which it

appears he was justified in granting the warrant. But if the want of jurisdiction is manifest from all the proceedings before him at the time, then he grants the warrant at his peril. Here, on the face of the original authority to collect the composition, there is a defect, which must have been obvious to the defendants. The composition allowed by law in lieu of statute duty, is in lieu of the statute duty required of each particular township, in respect of the roads in that township. The money to be raised, in this case, is not to constitute one general fund for the entire line of turnpike road, but is specifically to be applied for the repair of that part of the road in the particular township. I think, that the magistrates ought, in the exercise of their discretion, on the face of the authority itself, to have shown, that in their opinion, in each particular township, a composition in lieu of statute duty was advisable. Here, upon the face of this authority, they do not appear distinctly to have exercised any such discretion, because they have only stated that the maintenance and repair of *the said roads* can be more effectually carried on by a composition in money than by a performance of the statute duty in kind. I therefore think, that there was a defect in the authority itself, which Mr. Fielden had an opportunity of observing. I also strongly incline to think, though, upon that point, I do not mean to intimate any decided opinion, that it should be made to appear *upon oath* to both the magistrates present that a composition was advisable. The ground, however, upon which I pronounce my judgment in this case, is this, that assuming the magistrates to have said, that there ought to have been a composition in this particular township for the repair of the roads there in lieu of statute duty (which the warrant assumes them to have said), I think that it should have been made to appear what the quantum of composition was to be. That is in no respect ascertained as it ought to have been. It has been insisted, that the communication made to Johnson by Crackenthorpe, that he required a composition calculated at 6*d.* in the pound, was an intimation, that he considered the whole of the composition to be requisite for the repair of the roads in that particular township. From the evidence in this case, I do not believe that Crackenthorpe ever exercised any judgment upon that point. He seems to have considered the whole sum collected to be one entire fund for the repair of the whole of the roads, and to have meant to collect in each township, to the utmost extent which by law he could collect. I am of opinion, that the communication by Crackenthorpe to Johnson of itself was not sufficient, but that it ought to have been notified to the inhabitants of the parish or township, that, in the judgment of the surveyor, it was necessary that there should be a composition in lieu of so many days' team work, in order that the parishioners might have had the opportunity of contesting the claim made upon them. That not having been done, I am of opinion, that there was not any evidence before Mr. Fielden to justify him in granting this warrant, because there never has been an assessment duly made, and duly notified to the inhabitants of the parish. This rule must therefore be discharged.

HOLROYD, J. I am also of opinion, that the verdict is right against both the magistrates, on the ground last stated by my Brother BAYLEY.

I think, that there was not sufficient evidence before the magistrates to authorize them to grant a warrant. There was no valid assessment so as to bind any person to the payment of any specific amount of composition, the number of days' statute duty required for repairing the road, not having been ascertained or notified to the parish; and therefore sufficient was not done to legalize this demand made upon the plaintiff. The magistrates, therefore, had no right to grant the warrant. Rule discharged.*

* Best, J., was absent at Chambers.

January 28d, 1822.

On the first day of this term, William Elias Taunton, Christopher Puller, William George Adam, Launcelot Shadwell, and Edward Burtenshaw Sugden, of Lincoln's Inn, Esquires, took their places within the bar, as his majesty's counsel learned in the law.

WALTER v. SMITH.—p. 439.

A pawnbroker has no right to sell unredeemed pledges after the expiration of a year from the time the goods were pledged, if the original owner tender him the principal and interest due.

TROVER for a gold watch, a watch-key and two gold seals. Plea not guilty. At the trial before ABBOTT, C. J., at the London sittings after last Michaelmas term, it appeared that the plaintiff, on the 22d January, 1820, had pledged the articles mentioned in the declaration, with the defendant, who was a pawnbroker, resident at Bristol, and that the plaintiff did not require the defendant to return them until after the expiration of one year and a day from the time they were pledged. And the defendant then refused to return them, asserting that they had become forfeited in consequence of the year having expired. The plaintiff at the time of the demand, tendered to the defendant the amount of the principal and interest due in respect of the money advanced. At the time when the demand was made, the articles pledged remained in the possession of the defendant. They were subsequently sold by auction, and the defendant himself became the purchaser. At the trial, the Lord Chief Justice was of opinion, that under these circumstances, the plaintiff was entitled to recover; the act of the 39 and 40 G. 3, c. 99, not vesting the property absolutely in the pawnbroker after the expiration of a year and a day, but only giving him a power to sell, in order to reimburse himself for his principal and interest. The jury found a verdict for the plaintiff. And now,

Gurney moved for a new trial, and contended, that, by the 39 & 40 G. 3, c. 99, s. 17, the property in the unredeemed pledges, after the expiration of the time mentioned in the statute, vested in the pawnee. That section prescribes, that all goods which shall be pawned

or pledged, shall be deemed *forfeited*, and may be sold at the expiration of one whole year, exclusive of the day whereon the goods and chattels were so pawned as aforesaid; and that all goods and chattels so forfeited, of a certain value therein mentioned, shall be sold by public auction. Now, in order to give effect to the word "forfeited," the original owner must be taken to have absolutely lost his right to the goods. By s. 19, it is enacted, "that in case any person entitled to redeem goods in pledge, shall, before or upon the expiration of one year, from the time of pawning the same, give notice to the person having the same in pledge, not to sell the same at the end of the said one year, then such goods shall not be sold or disposed of, until after the expiration of three calendar months, to be computed from the expiration of the said year, during which term the owner of the goods shall have liberty to redeem the same." Now, by the legislature expressly reserving to the owner the liberty to redeem the same upon the terms mentioned in that section, they must have considered that the owner's right to redeem would have been otherwise extinguished.

ABBOTT, C. J. I think that we cannot give to the word *forfeited*, as used in this act of parliament, the effect contended for by the defendant. It is argued that its import is, that the party whose property is said to be forfeited, has absolutely lost all right to it. Now it is manifest, from the other provisions of this act of parliament, that, after the time for redeeming the property pledged is expired, the whole interest is not divested out of the original owner. If it were, the sale would be entirely for the benefit of the pawnbroker; but, by the 20th section of the act, it is provided, "that with respect to goods pawned for more than 10s., if they shall be sold for more than the principal money and profit due thereon at the time of such sale, the overplus shall, by the pawnbroker, be paid on demand to the pawner, in case the demand shall be made within three years after such sale, the necessary costs and charges of such sale being first deducted." The pawnbroker, therefore, is only to derive from the sale so much as will reimburse him for his principal and interest, and the expenses of the sale, and the overplus, if any, is to be returned to the owner. We cannot, therefore, consistently with this provision, give to the word *forfeited*, as used in the 17th section, the sense contended for on the part of the defendant. I am of opinion, that if the pledge be not redeemed at the expiration of a year and a day, the pawnbroker has a right to expose it to sale as soon as he can consistently with the provisions of the act; but if at any time before the sale has actually taken place, the owner of the goods tender the principal and interest, and expenses incurred, he has a right to his goods, and the pawnbroker is not injured: for the power of sale is allowed him merely to secure to him the money which he has advanced, together with the high rate of interest which the law allows to him in his character of pawnbroker. For these reasons I am of opinion, that no rule ought to be granted

BAYLEY, J. I am of the same opinion. The object of the sale is, to enable the pawnbroker to reimburse himself for the amount of the principal money advanced, and the interest due thereon. And if, be-

fore any sale takes place, the party pledging pays the pawnbroker his principal and interest, and expenses incurred; all the purposes of a sale are answered, and, consequently, the pawnbroker, in such a case, can have no right to sell. The words "deemed forfeited and may be sold," mean not that the things pledged shall become the absolute property of the pawnbroker, but only that they shall be so far forfeited as that the pawnbroker may take steps toward a sale. I think, therefore, that the owner having tendered to the pawnbroker all the money that he would be entitled to raise by sale, he had no right to sell, and, consequently, that the plaintiff is entitled to recover.

HOLROYD, J. I think that, by the 17th section, the property is not to be considered forfeited to all intents and purposes, but only for the purpose of enabling a sale to be had, by which the pawnbroker may pay himself his principal, and the profit which the law allows him to make in lieu of interest. Now the sale is for the benefit of the owner as well as of the pawnbroker, for if the property pledged sells for more than the principal and profit allowed to the pawnbroker in lieu of interest, he is accountable to the owner. The latter, therefore, continues to have an interest in the property, and must have a right to redeem it, by paying to the pawnbroker all that he would be entitled to derive out of it by a sale. It is true, that by the 17th section, the goods are forfeited for the purpose of sale; but that purpose is fully answered by the pawnbroker's being paid the amount of what is due to him upon the pledge. In this case a tender to that amount has been made to him, and therefore he had no right to put the owner to the burdensome and unnecessary expenses of a sale. I think, therefore, that no rule ought to be granted.

BEST, J. I am of the same opinion. The legislature never could have intended to use the word forfeited in the 17th section of this act, in the sense which is contended for by the defendants. That word generally means, the taking away all right from one person, and transferring all right to another. The words are, here, "that it shall be deemed forfeited, and may be sold." It is manifest, however, from the provisions of the act, that it is to be sold for the benefit of the person to whom it belongs, after securing to the pawnbroker his principal and interest; for the latter is directed to account to the original owner for the overplus, if any. It is clear, therefore, that the legislature did not intend wholly to transfer the interest of the original owner of the thing pawned to the pawnee: and, therefore, the word forfeited, as used in this section, cannot have the sense contended for. It would be absurd to hold, in this case, that the pawnbroker had a right to sell, for by the sale, he could be entitled to no greater benefit than he would have received by accepting the sum tendered, which was the full amount of the principal and interest due. I think, therefore, that this rule ought not to be granted.

Rule refused

DARWIN v. LINCOLN and LOCK.—p. 444.

By the 58 G. 3, c. 141, the memorial of an annuity must contain the description and place of residence of the witnesses to the annuity deed.

A mere surety who charges with the payment of an annuity his estate in fee simple of which he was seised in possession at the time of granting the annuity, and which was of greater annual value than the annuity, is a grantor within the meaning of the 17 G. 3, c. 26, s. 8, and therefore in such a case no memorial is required.

ACTION on a bond, dated 31st August, 1818, for 6000*l.*, the condition of which was set out in the declaration, and recited an indenture of the 23d December, 1812, between the defendant, Lincoln, of the first part, the plaintiff of the second part, John Birkett, therein described as of Cloak-lane, London, gentleman, of the third part, and Henry Birkett of the fourth part, by which Lincoln granted to John Birkett an annuity of 200*l.* during the lives of three persons therein mentioned, and the same was made chargeable upon, and issuing out of certain premises therein described, and for better securing the annuity, the premises were demised to Henry Birkett for a term of 500 years, in trust to pay the annuity, if in arrear. The condition then recited another indenture of the 19th June, 1815, made between the same parties, by which the plaintiff, at the request of Lincoln, charged the same premises with the payment of another annuity of 100*l.* to John Birkett, for the lives of four persons therein mentioned, and the life of the survivor; and for better securing the payment of both these annuities, the plaintiff joined with the defendant, Lincoln, in two bonds and warrants of attorney to John Birkett, in the two several sums of 4000*l.* and 2000*l.* It then recited that he joined in the said grant and other securities, as surety only for Lincoln, and that the premises chargeable with the payment of the annuities, were the sole property of the plaintiff, and as an indemnification of the plaintiff against any loss by reason of his having become surety, Lock, the other defendant, agreed to enter into a joint and several bond to the plaintiff. The condition of the bond was then declared to be for the due payment of the annuities by Lincoln, and in case of his default, that both the defendants should indemnify and save harmless the plaintiff. The breach assigned was, that on the 19th December, 1820, two quarterly payments of the annuity of 200*l.* became due, and that on the 23d December, 1820, two quarterly payments of the annuity of 100*l.* became due; that defendant, Lincoln, did not pay the same, and that the plaintiff thereby became liable and paid. The defendant, Lincoln, pleaded his bankruptcy. It is unnecessary to state all the pleas, inasmuch as the questions discussed were fully raised by the issues taken on the third plea. That plea was substantially as follows: As to the annuity of 200*l.*, that the memorial was defective in not stating a clause, whereby Lincoln and the plaintiff were at liberty to purchase the annuity upon certain conditions therein mentioned. And as to the annuity of 100*l.*, that the memorial was defective in not stating the addition and place of residence of the subscribing witness to the annuity deed. It appeared by the memorial which was set out in the plea, that Peter Downs, one

of the subscribing witnesses, was described merely as the clerk of Mr. Birkett. Replication as to so much of the plea as related to the arrears of the annuity of 200*l.*, that that annuity, at the time of the granting thereof, was secured upon freehold premises in the condition of the bond mentioned, which were then of equal or greater annual value than the annuity of 200*l.*, and of which the plaintiff, then being one of the grantors of the said annuity, was then seised in fee simple in possession. Upon this issue was taken and joined. Replication as to so much of the third plea as related to the arrears of the annuity of 100*l.* in the last breach mentioned, that that annuity at the time of the grant thereof, was secured upon certain freehold lands in Great Britain, to wit, upon the freehold premises in the condition of the bond mentioned, which were then of equal or greater annual value than the said last-mentioned annuity, over and above any other annuity, and the interest of any principal sums charged or secured thereon, of which the said grantors of the said annuity then had notice, to wit, of the annual value of 350*l.*, and which said freehold messuage, tenement, and premises, the said plaintiff being then one of the grantors, of the said last-mentioned annuity, was then and there seised in fee simple in possession. Upon this replication issue was also taken and joined. At the trial before ABBOTT, C. J., at the Middlesex sittings after last Easter term, the jury found that the premises upon which the annuities were secured, were of the annual value of 200*l.* But that they were not of the annual value of 300*l.* On the part of the plaintiff, a rule nisi was obtained last Easter term, for entering up judgment for the plaintiff on the last issue non obstante veredicto, on the ground that the annuity act of the 53 G. 3, c. 141, did not require the addition and place of residence of the witnesses to the deed, to be inserted in the memorial. And on the other hand, a rule nisi was obtained on the part of the defendant, to arrest the judgment on the other issue found for the plaintiff, on the ground that the plaintiff was alleged in the pleadings to be the grantor of the annuity, whereas it clearly appeared from the recital in the condition of the bond, that he was a mere surety, and that Lincoln was the grantor. The Court having ordered both the rules to be brought on together; the case was now argued by

Marryat, Gaselee, and Carter, for the plaintiff. The first annuity having been granted before the statute 53 G. 3, c. 141, must be regulated by the provisions of the 17 G. 3, c. 26. Now, the plaintiff is clearly a grantor of the annuity within the meaning of the 8th sec. of that statute. For he joined in the different securities, and charged his own estate with the payment of the annuity. Secondly, the 53 G. 3, c. 141, s. 2, does not require that the description of the witness should be set out in the memorial, but merely that it should contain the names of all the parties, and of all the witnesses thereto, &c. Now here the memorial does contain the names of the parties and witnesses. And the schedule ought not to be so construed as to defeat the enacting clause. Besides, in this case, the witness is sufficiently described as the clerk of Mr. Birkett, and therefore, might be found at any time, if required. In *Haslope v. Thorne*, 1 Maule & Selw. 108, it was held

sufficient for the plaintiff's clerk, in an affidavit to hold to bail, to state his place of abode to be the office where he is employed, though he slept at another place. Here, the witness is described in the memorial as the clerk of Mr. Birkett, and in the deed recited in the bond, the latter is described as of Cloak-lane. In *Barber v. Gamson*, 4 Barn. & A. 281, the Court held that it was not necessary to insert in the memorial the description by place of residence, or otherwise, of the persons for whose lives the annuity was granted.

Scarlett, contra. The 53 G. 3, c. 141, s. 2, requires a memorial of the date of the deed, of the names of all the parties, and of all the witnesses, &c., to be enrolled in the form and to the effect following, and then follows a table, showing what the substance and form of the memorial is to be, and under the head of 'names of witnesses' there is E. F. "of." The table, therefore, evidently imports, that the place of residence of the witness should be inserted, and the mode given in the table of making the memorial, must be considered as incorporated in the enacting clause. Secondly, Darwin is not the grantor of this annuity, for he is described in the condition of the bond as a mere surety. The legislature intended to protect a party who borrowed his money upon annuity interest, and who had no marketable estate. Here Lincoln the borrower had no marketable estate, and he therefore was the person intended to be protected by the statute. In *Amhurst v. Skynner*, 12 East, 268, Lord ELLENBOROUGH expressed his regret, that a memorial was not required in all cases. Besides, the Court will so construe this clause as to further the remedy contemplated by the legislature, and they will therefore rather enlarge the enacting clause than the exception.

ABBOTT, C. J. There is no mention of sureties in the act 53 G. 3, c. 141; and the word grantor is only to be found in the excepting clause, and in the 7th sect. by which an alphabetical list is required to be kept of the names and residences of the grantors of annuities. In the 17 G. 3, c. 26, the word grantor is only mentioned in the excepting clause. Now, there being no express words in these acts, to show that the word *grantor* is used in a more limited sense, I am of opinion, that a man who makes his estate liable to the payment of an annuity, is a grantor of that annuity within the meaning of both those acts of parliament, and consequently that, as far as the annuity of 200*l.* was concerned, it is a case falling within the exception of the annuity acts, and therefore that no memorial was required. I am also of opinion, that by using the word "of" following E. F., in the 53 G. 3, c. 141, the legislature evidently intended, that the place of abode of the witness should be inserted. It is of great importance that that should be done, for otherwise annuity deeds might be executed in the presence of witnesses wholly unknown to the party, and he might afterwards have no means of finding them out for the purpose of obtaining their evidence as to what passed at the time of execution. I think, therefore, that the rule for arresting the judgment, and the rule for entering up judgment for the plaintiff, notwithstanding the verdict on the issue found for the defendant, ought both to be discharged.

BAYLEY, J. I am clearly of opinion, that the description of the witnesses must be inserted in the memorial, and that the description given of the witness in this memorial, as the clerk of Mr. Birkett, is insufficient. The 53 G. 3, c. 141, s. 2, does not merely require that the names of the witnesses shall be inserted in the memorial, but that they shall be inserted in the form and to the effect following, with such alterations therein as the nature and circumstances of the particular case may reasonably require; and the form is then given, and after the name of the witness, the word "of" follows. Now that word must have been intentionally introduced, and must have had some object; and I think the intention of the legislature was this, that the description of the witness should be given, in order that the party executing the deeds might be able to find the witness when required. There may be many persons of the same name, and therefore the inserting of the name alone would not furnish sufficient information. It has been said, that the description here given of the witness, as the clerk of Mr. Birkett, is sufficient, because, by inquiring of Mr. Birkett, the witness may be found. But Mr. Birkett may refuse to give the information: whereas, if the party has the information which the form of the schedule implies, he will be able to trace the witness. I am also of opinion, that it would be a forced construction of the excepting clause in either of these statutes, to hold, that the word "grantor" must of necessity be confined to the person for whose use the annuity is granted. These acts are extremely penal in their consequences, in avoiding the different instruments executed to secure the annuity, and I think that a surety, by making himself a grantor, satisfies the words of the statutes; and if that be so, we are not warranted, in a penal statute, in saying that he is not within its protection. Then, as this annuity was secured upon land, of which the plaintiff was seised in fee simple, and as he concurred in granting the annuity, I think that he must be considered as a grantor within the fair spirit of the excepting clause. He pledges his estate for payment of the annuity, and he can never redeem the estate without paying the whole of the money which was paid as the consideration for the annuity, and if he were willing that his estate in fee simple should be subject to that charge, he had the power, at least, of substituting that estate, and of raising money upon it by way of mortgage. This is, therefore, a case in which the persons who concurred in borrowing the money were not driven to the necessity of borrowing by annuity, and that being so, I am of opinion, that it is within the meaning of the exception, and, consequently, that the annuity for 200*l.* is good. Both the rules must therefore be discharged.

BEST, J. I am clearly of opinion, that the memorial does not contain a sufficient description of the witness, for the act requires, that the memorial shall be in the form or to the effect mentioned in the act. Now it is here neither in the form nor to the effect there stated. The witness to the deed is described merely as clerk to Mr. Birkett; that is not the description which the act requires. He may be clerk for a single day, or his employer may not be disposed to give the required

information. He may have an interest in withholding it. I am therefore of opinion that the rule obtained by the plaintiff must be discharged. As to the other question, I am of opinion that the plaintiff is a grantor of the annuity within the 10th section of the act, and that being so, the judgment ought not to be arrested.

Both rules discharged.*

* Holroyd, J., was absent at Chambers.

BEARDMORE v. RATTENBURY.—p. 45

Where, on a plea of *actio non accrevit infra sex annos*, it appeared that a writ of *testatum special capias*, was issued within six years in Michaelmas term, and an *alias testatum capias* in Easter term following, but no writ in Hilary term: *Held*, that this was sufficient to take the case out of the statute, the suit being actually, though irregularly commenced within six years, and that the continuance in Hilary term might be supplied at any time.

Assumpsit on several bills of exchange. Plea, *actio non accrevit infra sex annos*, and issue thereon. At the trial, before ABBOTT, C. J., at the Guildhall sittings after last Michaelmas term, it appeared, that the action had been commenced by original; and, in order to take the case out of the statute, the plaintiff gave in evidence a writ of *testatum special capias*, issued a short time before the expiration of the six years, and returnable in Michaelmas term, 1820, and then returned *non est inventus*; and, secondly, an *alias testatum capias* issued subsequently to the six years, returnable in Easter term, 1821. No writ or entry of a writ, returnable in Hilary term, was produced in evidence. The Lord Chief Justice thought this sufficient to take the case out of the statute, and thereupon the plaintiff had a verdict. And now,

Scarlett moved to set aside the verdict and to enter a nonsuit. Here there was a discontinuance, for there was no writ returnable in Hilary term. In *Harris v. Woolford*, 6 T. R. 617, it is indeed laid down, that when once a writ is duly returned, the subsequent continuances may be entered at any time, and that a *latitat* is a good commencement of a suit; but that is on the ground that it is the common practice of the Court to commence suits by a *latitat*. There is no decision, however, that a *testatum special capias* is a good commencement of a suit, it being the ordinary practice to sue out a *capias* first. Here, too, it should have been specially replied.

ABBOTT, C. J. The question here is, not whether the suit was regularly commenced within six years, but whether it was actually commenced within that time; and although, therefore, it might be irregular to sue out a writ of *testatum special capias* in the first instance, still it is clear that the suit was then, however irregularly, commenced. Two courses were open to the plaintiff, if any objection had been taken to the regularity of his proceedings; one by applying to the Master of

BAYLEY, J. I am clearly of opinion, that the description of the witnesses must be inserted in the memorial, and that the description given of the witness in this memorial, as the clerk of Mr. Birkett, is insufficient. The 58 G. 3, c. 141, s. 2, does not merely require that the names of the witnesses shall be inserted in the memorial, but that they shall be inserted in the form and to the effect following, with such alterations therein as the nature and circumstances of the particular case may reasonably require; and the form is then given, and after the name of the witness, the word "of" follows. Now that word must have been intentionally introduced, and must have had some object; and I think the intention of the legislature was this, that the description of the witness should be given, in order that the party executing the deeds might be able to find the witness when required. There may be many persons of the same name, and therefore the inserting of the name alone would not furnish sufficient information. It has been said, that the description here given of the witness, as the clerk of Mr. Birkett, is sufficient, because, by inquiring of Mr. Birkett, the witness may be found. But Mr. Birkett may refuse to give the information: whereas, if the party has the information which the form of the schedule implies, he will be able to trace the witness. I am also of opinion, that it would be a forced construction of the excepting clause in either of these statutes, to hold, that the word "grantor" must of necessity be confined to the person for whose use the annuity is granted. These acts are extremely penal in their consequences, in avoiding the different instruments executed to secure the annuity, and I think that a surety, by making himself a grantor, satisfies the words of the statutes; and if that be so, we are not warranted, in a penal statute, in saying that he is not within its protection. Then, as this annuity was secured upon land, of which the plaintiff was seised in fee simple, and as he concurred in granting the annuity, I think that he must be considered as a grantor within the fair spirit of the excepting clause. He pledges his estate for payment of the annuity, and he can never redeem the estate without paying the whole of the money which was paid as the consideration for the annuity, and if he were willing that his estate in fee simple should be subject to that charge, he had the power, at least, of substituting that estate, and of raising money upon it by way of mortgage. This is, therefore, a case in which the persons who concurred in borrowing the money were not driven to the necessity of borrowing by annuity, and that being so, I am of opinion, that it is within the meaning of the exception, and, consequently, that the annuity for 200*l.* is good. Both the rules must therefore be discharged.

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Scarlett moved to set aside the verdict and to enter a nonsuit. Here there was a discontinuance, for there was no writ returnable in Hilary term. In *Harris v. Woolford*, 6 T. R. 617, it is indeed laid down, that when once a writ is duly returned, the subsequent continuances may be entered at any time, and that a *latitat* is a good commencement of a suit; but that is on the ground that it is the common practice of the Court to commence suits by a *latitat*. There is no decision, however, that a *testatum special capias* is a good commencement of a suit, it being the ordinary practice to sue out a *capias* first. Here, too, it should have been specially replied.

ABBOTT, C. J. The question here is, not whether the suit was regularly commenced within six years, but whether it was actually commenced within that time; and although, therefore, it might be irregular to sue out a writ of *testatum special capias* in the first instance, still it is clear that the suit was then, however irregularly, commenced. Two courses were open to the plaintiff, if any objection had been taken to the regularity of his proceedings; one by applying to the Master of

the Rolls for leave to sue out a prior writ, the other by applying to this Court for leave to strike out the testatum part of the writ. The irregularity might, therefore, have been cured, and the action might have proceeded. A latitat, equally with a testatum special capias, supposes the existence of a prior writ, and yet that has been held to be a good commencement of a suit. If, then, this suit was properly commenced, the continuances may be entered at any time; and, therefore, the supposed discontinuance is not a ground of nonsuit. A special replication was not necessary; it is necessary where the form of the plea states that the plaintiff did not file his bill within six years, because the production of a writ of latitat within six years, would not negative that fact; but here the plea states, that the action was not commenced within six years, which is negated by the production of this writ; and a general replication was therefore sufficient. There is, therefore, no ground for disturbing the present verdict.

Rule refused.

WOOD v. VEAL.—p. 454.

In trespass and justification under a public right of way, the locus in quo, which was not a thoroughfare, had been under lease from 1719 to 1818, but as far back as living memory could go it had been used by the public, and lighted, paved and watched under an act of parliament, in which it was enumerated as one of the streets in Westminster. After 1818, the plaintiff, who previously lived for 24 years in its neighbourhood, inclosed it: *Held*, that under these circumstances, the jury were well justified in finding that there was no public right of way, inasmuch as there could be no dedication to the public by the tenants for 99 years, nor by any one, except the owner of the fee. *Quere*, whether there can be a public highway which is not a thoroughfare!

TRESPASS for breaking and entering a certain yard and close of the plaintiff, in the parish of St. John, Westminster, and pulling down his fence, &c., there erected. The defendant justified the trespass under a public right of way. At the trial at the Westminster sittings, after last Michaelmas term, before ABBOTT, C. J., it appeared that the locus in quo, which was called Little Abingdon street, Westminster, was not a thoroughfare, but that, as far back as living memory could go, it had been used by all persons desirous of going there, and that in 11 G. 3, it had been enumerated amongst other streets in the act of parliament, then passed for paving, cleaning, and lighting the squares, streets, &c., of Westminster. That the commissioners had accordingly paved and lighted it, and that watchmen had been stationed there, &c., &c. On the part of the plaintiff, it appeared that in the year 1719, a lease for 99 years of the plaintiff's premises, including the yard in dispute, had been granted by the then owner of the fee; which having expired in 1818, the plaintiff, in 1820, having for 24 years previously lived in the neighbourhood, erected the fence in question. The Lord Chief Justice left it to the jury to say, whether they thought there had been any dedication to the public previously to 1719, telling them, that in that case they ought to find for the defendant; but if not, then he told them that there could be no dedication to the public, except by the owner of

the fee; and that the permission by the tenants for 99 years would not bind the landlord; and that the circumstance of the lease for 99 years, which had been proved, explained, in a great degree, the use by the public, as not being referrable to a dedication by the landlord. Under this direction, the jury found a verdict for the plaintiff. And now,

Gurney moved for a new trial. In this case the jury ought to have been directed to presume a dedication to the public. Here, as far back as living memory could go, the public had used this place, which having been originally called Linsey-lane, had subsequently acquired the name of Little Abingdon street, and had been so named in a public act of Parliament for lighting and paving Westminster. Under this act it had been lighted and paved, so that this case is stronger than that of *Rez v. Lloyd*, 1 Camp. 260, where the lighting only was held to be strong evidence of a public way. As to its being not a thoroughfare, that is not important; for Lord KENYON, in the *Rugby Charity v. Merryweather*, 11 East, 375, n., held that that circumstance could make no difference. In *Rez v. Barr*, 4 Campb. 16, Lord ELLENBOROUGH decided that the reversioner having knowledge of the use by the public, was bound by it. Now, in this case, the present plaintiff had, for 24 years, lived in the neighbourhood, and must have known of the public use of this street.

ABBOTT, C. J. I have great difficulty in conceiving that there can be a public highway which is not a thoroughfare, because the public at large cannot well be in the use of it. In this case, however, I left it to the jury to consider, whether there had been a dedication to the public, telling them that a highway might exist, although it was not a thoroughfare. Nothing done by the lessee without the consent of the owner of the fee would give the right of way to the public. Here, as the land was demised by the lease of 1719, which expired in 1818, it seems to me that the proper question to consider was, whether there had been a dedication to the public before 1719, or subsequently to that period, with the consent of the owner of the fee. I am still of opinion that the case was presented properly to the consideration of the jury, and I think they have found a right verdict.

BAYLEY, J. It is not necessary to decide upon the present occasion, whether there can be a highway which is not a thoroughfare. For the point in this case is, whether, supposing that to be so, there has been a dedication of this way to the public. Now, in order to give the public that right, it must be done with the consent of the owner of the fee; for where it is given by an individual having a limited right, it can only continue for a limited period. Here, upon the evidence, it appears that the permission was given, if at all, by the lessee for 99 years. I think, therefore, that the case was properly left to the jury, and that they have found a proper verdict.

HOLROYD, J. I am of the same opinion. The opinion of Lord KENYON, in the *Rugby Charity v. Merryweather*, is somewhat shaken by the observations of Lord C. J. MANSFIELD in *Woodyer v. Haaden*, 5 Taunt. 142. But it is not necessary to determine that question here, for this case has been determined upon principles which assume the case of the *Rugby Charity v. Merryweather* to be good law.

BEST, J. I am quite satisfied with the verdict which the jury have found in this case, and with the manner in which the question was left to them. No man has a greater respect for the learned judge who decided the case of the *Rugby Charity v. Merryweather* than I have, but I think that that decision was a departure from principles usually received in the law. If a road be for the accomodation of particular persons only, it is not a public road, and, therefore, I can see no reason why the inhabitants in a street which is not a thoroughfare, should not put up a fence at the end of it and exclude the public. It is not, however, necessary to decide that question in this case, because, independently of it, the plaintiff was entitled to the verdict.

Rule refused.

DOE, on the Demise of SPENCER, v. CLARK.—p. 458.

A testator devised a copyhold estate to his wife for life, remainder to his son, and the heirs of his body, and there was no custom in the manor to entail copyholds; the son survived his mother, and had issue, and becoming bankrupt, he died before admittance, and before any bargain and sale was executed by the commissioners of this estate: *Held*, that he took a fee simple conditional at common law, and that the commissioners might execute a valid conveyance of the estate after his death, pursuant to 1 Jac. 1, c. 15, s. 17.

EJECTMENT to recover a copyhold messuage, divided into tenements with their appurtenances, situate at Long Melford, in the county of Suffolk. The case was tried at the last Spring assizes for that county, before GRAHAM, B., when a verdict was found for the lessor of the plaintiff, subject to the opinion of this Court upon the following case. The grandfather of the lessor of the plaintiff being seised in fee according to the custom of the manor of the rectory of Melford, of the estate for which this action was brought, and having duly surrendered the same to the use of his will, devised as follows: "First, I give and devise unto my wife, all my freehold and customary, or copyhold messuages or tenements, with the outhouses, &c., the copyhold being surrendered to the use of my will, situate in Melford, and now in the several occupations of myself and others: to hold the same to her for the term of her natural life, and from and after the decease of my wife, then I give and devise unto Paul Spencer, my son, all that messuage and tenement, with the outhouses, &c. now in my own occupation; to hold the same to him, and the heirs of his body lawfully to be begotten for ever. But in case my son shall die without issue, or shall not survive his mother; then I devise all the said last-mentioned premises with the appurtenances unto my two daughters, Alice and Sarah, to hold the same to them and their heirs, as tenants in common, and not as joint tenants. The testator, shortly after making his will, died, and his wife Jane Spencer, was, on the 20th November, 1783, admitted under the will to the copyhold premises so devised to her for life, &c. In 1802, she died, leaving Paul Spencer, her son, living, who died on the 19th April, 1803, without having been admitted to the

premises devised to him under the will of his father. Paul Spencer left William Spencer, the lessor of the plaintiff, the only son of his body him surviving, (then a minor,) who was admitted to the premises in question, at a special court held the 6th day of June, 1803. On the 13th December, 1793, a commission of bankruptcy issued against Paul Spencer, the father of the lessor of the plaintiff, upon which he was found and declared a bankrupt. On the 2d December, 1802, the assignees contracted for the sale of the premises in question, and on the 26th September, 1805, the commissioners under the commission against Paul Spencer, together with the assignees, conveyed the premises in question, by bargain and sale enrolled, to the defendant in fee for a valuable consideration. And on the 3d July following, the defendant was admitted in the Manor Court under the bargain and sale. The question for the opinion of the Court was, whether any, and what interest passed by the bargain and sale executed after the death of the bankrupt to the defendant.

Storks, for the lessor of the plaintiff. The effect of this will was to give to the bankrupt an estate tail, supposing that the land had been freehold; but as it was copyhold, and no custom is found to exist within the manor for entailing, it is only an estate upon condition; such an estate, however, is within the meaning and policy of 21 Jac. 1, c. 19, s. 12. Then if so, the question is, whether the provision of 1 Jac. 1, c. 15, s. 17, can be applied to a subsequent act of Parliament. That point has never been decided. In *Parker v. Bleeke*, Cro. Car. 568, the bankrupt died after the bargain and sale, and before the admittance, and all that the Court decided was, that upon admittance the bargainee had the estate in him by relation, from the time of the bargain and sale. So in *Beck dem. Hawkins v. Welsh*, 1 Wils. 276, it is quite clear, although not so expressly stated, that the bargain and sale must have been executed previously to the death of the bankrupt. There is, therefore, no case in which it has yet been held, that the 21 Jac. 1, c. 19, s. 12, can be coupled with 1 Jac. 1, c. 15, s. 17; and upon principle it ought not, for it would be a strong construction, and its consequences would go to deprive the issue in tail of their rights, after they had become vested by the death of the tenant in tail; and besides, copyholds are not mentioned at all in 1 Jac. 1, c. 15, s. 17. Here, too, the bankrupt died without being admitted. *Vernon v. Vernon*, 7 East, 8.

Cooper, contra. In *Crisp v. Pratt*, Cro. Car. 549, it was held, that copyholds were within the purview of all the statutes of bankruptcy, viz. 13 Eliz., 1 Jac. 1, and 21 Jac. 1; and it was there added, that those statutes ought to be construed liberally, to make as strong provision as they may against the bankrupt. If so, it may safely be contended, that the provision of 1 Jac. 1, c. 15, s. 17, may be construed with 21 Jac. 1, c. 19, s. 12, and then there is no doubt in this case. But it is not necessary to contend this. For the estate of the bankrupt under the will being a fee simple conditional at common law, and the condition being fulfilled, his estate might have been conveyed away during his life without the assistance of 21 Jac. 1, c. 19, s. 12, under

the 13 Eliz. c. 7, s. 11, and then there can be no doubt that 1 Jac. 1, c. 15, s. 17, applies to the case. As to the want of admittance of the bankrupt, it is unimportant. For the admittance of the tenant for life was, for this purpose, an admittance of him in remainder.

ABBOTT, C. J. I am of opinion, that the effect of the will stated in the case, was to give to the bankrupt a fee simple conditional, the condition being, that the estate was to become absolute on his having issue and surviving his mother. Both these events happened, and therefore, the fee simple conditional vested in him, his mother having been also admitted, in pursuance of the will, to the copyhold property. He, therefore, under these circumstances, had a good title against all the world, and the commissioners of bankrupts might clearly have sold the estate during his lifetime, pursuant to the provisions of 13 Eliz. c. 7, s. 11. Here, however, his death intervened before the contract which had been made during his lifetime had been completed. The statute 1 Jac. 1, c. 15, s. 17, provides, that the death of the bankrupt shall not prevent the commissioners from dealing with his estate. For it enacts, that if the bankrupt die before the commissioners shall distribute his goods, lands, and debts, they may still proceed in execution, in and upon the said commission, for and concerning his goods, lands, tenements, hereditaments, and debts, in such sort as they might have done if he were living. But it is said, that copyholds are not within this clause. Without any authority on this subject, I should have been of opinion, that the word "land" there found would apply to every species of land mentioned in the 13 Eliz. c. 7, whether copyhold or freehold. It was, however, decided, in the case of *Crisp v. Pratt*, that copyholds were within the statute 1 Jac. 1, c. 15. That is an authority expressly in point. Taking, therefore, the whole case together, it seems to me perfectly clear, that the deed of bargain and sale executed by the commissioners operated to defeat the estate, which would otherwise have vested in the lessor of the plaintiff, under his grandfather's will.

BAYLEY, J. It is not necessary to determine in this case, whether an estate tail could be divested, after the death of the bankrupt, by a bargain and sale executed by the commissioners; for this being a copyhold estate, and there being no custom stated to exist within the manor for entailing copyhold, the estate taken by the bankrupt was a fee simple conditional at common law. Then, this being an estate in fee simple conditional at common law, as soon as the bankrupt had issue, he had the same power over the property as if he had been seised of it in fee simple absolute. Now, under the statute of Elizabeth, the commissioners had full power to dispose of land so held by the bankrupt, and during his life they might have done so by a common conveyance. In such cases, after the death of the bankrupt, the same power was given to them by the statute 1 Jac. 1, c. 15, s. 17. The object of the statute 21 Jac. 1, c. 19, s. 12, was different. Previously to that act, the commissioners had no power to compel the bankrupt to bar his issue by a recovery; and therefore, it was not in their power to make a valid conveyance of entailed property belonging to the

bankrupt. The legislature thought this unjust, and therefore enacted, that the commissioners might dispose of such property by deed indented and enrolled. But before that statute, the commissioners had full power to dispose of an estate in fee simple conditional. It is said, that there was not any admittance of the bankrupt; but the admittance of the tenant for life was sufficient. The lord of the manor indeed might have compelled him to be admitted to secure his fine. But as far as strangers were concerned, he was a complete tenant before that time. Besides, if that objection were well founded, it would put an end to the plaintiff's title also. Upon the whole, I am of opinion, that the defendant is entitled to our judgment.

HOLROYD, J. I am of opinion, that the estate passed by the bargain and sale, notwithstanding the previous death of the bankrupt. It is established by many cases, that the admittance of the tenant for life is a sufficient admittance of those in remainder, although not such as to bar the lord of the manor of his fine. That being so, the question is, as to the nature of the estate taken under the will. If that was a fee simple conditional, there is an end of the case. But as no custom is found for entailing copyholds in the manor, the estate taken by the bankrupt was a fee simple conditional, and therefore might, during the life of the bankrupt, have been conveyed by the commissioners under the provisions of the 13 Eliz. c. 7, s. 11. The clause, therefore, in the 1 Jac. 1, c. 15, seems to me to apply to the present case. The 21 Jac. 1, c. 19, s. 12, does not apply to it. That act only empowered the commissioners to bar the issue, where the bankrupt could have done so by suffering a recovery. It is not necessary in the present case to determine what would be the effect of a bargain and sale executed by the commissioners after the death of the bankrupt in a case where, during his life, he had been seised of an estate tail.

BEST, J., concurred.

Judgment for the defendant.

DOE, on the Demise of ELIZABETH LIVERSAGE. v.
VAUGHAN and WALKER.—p. 464.

Where a testator bequeathed a burgage tenement to his nephew, J. L., for life, and from and after his decease, to all and every the child and children of J. L., lawfully begotten, or to be begotten, whether sons or daughters, they, if more than one, to take, as tenants in common, in equal shares and proportions; and for want of such issue, to his own right heirs for ever: *Held*, that under this devise, J. L. took only an estate for life, and that after his death his children took only estates for life as tenants in common.

EJECTMENT for a messuage and premises called the Golden Lion Inn, situate at Newcastle-under-Line, in the county of Stafford. At the trial before PARK, J., at the last Lent assizes for the county of Stafford, a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court on the following case: Thomas Liversage being seized in fee of the premises in question, on the 6th December, 1788, made his will, by which he devised a burgage tenement in Newcastle-under-Line,

to his brother Joseph Liversage for life, and then he devised as follows: "I give and devise all that messuage, tenement or dwelling-house, standing, and being in Newcastle-under-Line aforesaid, now in the holding of John Harrison, with the brewhouse, &c., unto my brother, Joseph Liversage, and his assigns, for and during the term of his natural life, desiring him to be kind to his and my sister, Mary Salmon; and from and after his decease, I devise the said messuage, burgage tenement, or dwelling-house, with their appurtenances, so before given and devised by me, to my said brother Joseph for life, *unto my nephew John Liversage and his assigns, for and during the term of his natural life, and from and after his decease, unto all, and every the child and children of the said John Liversage, lawfully begotten, or to be begotten, whether sons, or daughters, they, if more than one, to take as tenants, in common, in equal shares and proportions, and for want of such issue, to my own right heirs for ever.* And I devise unto my said nephew, John Liversage, his heirs and assigns for ever, all that dwelling house with the appurtenances, now in the tenure of Thomas Stretch. Also, I devise unto my nephew, Robert Liversage, and his assigns, for and during the term of his natural life, all that my messuage, burgage, tenement or dwelling house, in Newcastle-under-Line, now in my holding, with the brewhouse, &c. And from and immediately after his decease, I devise the same messuage, burgage, tenement or dwelling house, with the rights and appurtenances to the same belonging, unto all and every the child or children of the said Robert Liversage, lawfully begotten, whether sons or daughters, they, if more than one, to take as tenants in common, in equal shares and proportions, and for want of such issue, to my own right heirs for ever. And I devise all that one day-work, or reputed day-work of copy-hold land, lying and being near Newcastle aforesaid, in a certain common or town field, called the Stubbs, unto my said nephew, Robert Liversage, his heirs and assigns for ever." There were several other devises of personal and real property in the will. The testator died 27th June, 1797, seized of the premises in question, without altering or revoking his will. Joseph Liversage died in the life-time of the testator, on the 29th June, 1791. At the time of the testator's decease, Robert Liversage was his heir at law, being the eldest son of Joseph, the testator's brother. On the 1st March, 1798, Robert Liversage made his will, duly executed and attested, and devised all his real estate in possession, reversion or remainder, to Elizabeth Liversage, the lessor of the plaintiff, for life, with remainders over. Robert Liversage died 6th February, 1799, without altering or revoking his will. John Liversage entered into possession of the premises devised to him by the will of Thomas Liversage, and died in 1800, leaving two daughters, Ann and Elizabeth, him surviving. Ann, the eldest daughter, married the defendant, Joseph Vaughan, and is still living. Elizabeth, the youngest daughter, married, but died a minor on the 26th July, 1810, leaving her husband and one child her surviving; this child died in about a fortnight after. Upon her death, the defendant, Vaughan, and his wife, took possession of the whole of the premises devised to John Liversage, and afterwards by deed of feoff-

ment, bearing date, 13th December, 1814, and fine with proclamations of Hilary term, 1815, conveyed the premises to one Richard Richardson in fee, to such uses as Joseph Vaughan should by deed or will appoint; and in default thereof to Joseph Vaughan for life, afterwards to the use of Alexander Oliver and his heirs, during the life of Vaughan, in trust for Vaughan and his assigns; remainder to the use of Vaughan, and his heirs and assigns for ever. And afterwards, by deeds of lease and release, dated 13th and 14th February, 1815, the release made between Joseph Vaughan and his wife of the one part, and John Walker of the other part; Joseph Vaughan, under the power contained in the deed of the feoffment, as a security by way of mortgage, conveyed the premises to John Walker in fee, subject to redemption on payment, &c., and a recovery was suffered of the premises in Michaelmas term, 1815, to the use of John Walker, for the better securing the money advanced. The defendant, Walker, was in the receipt of the rents and profits of the premises under the above conveyance. In Hilary term, 1815, Vaughan and his wife levied a fine, sur conuzaunce de droit come ceo, of the premises, the last proclamation on which took place in Michaelmas term, 1815. The declaration in ejectment was delivered on the 19th January, 1821, and before the day of the demise laid in the declaration, and within the time limited by law, the lessor of the plaintiff duly made an entry on the premises to avoid the fine.

Campbell, for the lessors of the plaintiff. Under this devise, John Liversage took only an estate for life, and after his death, his children took as tenants in common for life. There is here no general intent to be found, by which the particular intent in this clause of the will is to be overruled. The devise in this case is to John Liversage for life, and from and after his decease, to all and every the child and children of John Liversage, lawfully begotten or to be begotten, whether sons or daughters. Now it is clear, that by this only the immediate issue of J. Liversage were meant, and not generally the race to descend from him. In *Wild's case*, 6 Co. 16 b, land was devised in remainder to R. W. and his wife, and after their decease to their children; and it was held, that the children took only an estate for life in remainder. And *Goodwyn v. Goodwyn*, 1 Ves. sen. 226, is to the same effect. The words "child or children" are therefore here words of purchase and not of limitation, and they are further qualified by the words which follow, "they, if more than one, to take as tenants in common, in equal shares and proportions;" which words were much relied on in *Doe v. Jesson*, 5 M. & S. 95. And though that case has since been overruled in the House of Lords, it was on another ground, viz. that there the first devise being in terms of an estate tail, could not be cut down by these subsequent words to an estate for life. But here, the prior words are such as of themselves would only give an estate for life, and the construction is therefore fortified by the subsequent clause. Then come the words on which the other side rely, "and for want of such issue." But, "such issue" must be words of reference to what has preceded, viz. "child or children." The clause is therefore tantamount to "and for want of such child or children," which are manifestly not sufficient

to create an estate tail by implication. *Hay v. Lord Coventry*, 3 T. R. 83, and *Foster v. Earl of Romney*, 11 East, 594, are authorities on this point. Then, if only an estate for life was devised by the will, it is quite clear that there has been a forfeiture of the estate by the fine which has been levied, Com. Dig. tit. Forfeiture, A.

Puller, contra. It may be admitted, that if an estate for life only passed by the will to the children of John Liversage, there was a forfeiture; but here, the question turns on the intention of the testator, to be collected from the whole will. This was a devise of a burgage tenement, and it can hardly be supposed that the testator who in the same will had devised another burgage tenement, in the same way, to Robert Liversage, the heir at law, could have intended, if John Liversage should die, leaving a large family, then, that on the death of each child, a proportionate part of his tenement should go over to the heir at law, who was already provided for. Here the devise was to persons not in esse at the time of the will; and, under such circumstances, the word "children" has, in many cases, been held to be co-extensive with issue, and to include remote descendants. *Cook v. Cook*, 2 Vernon, 545, and *Wild's case*, are authorities for this. In *King v. Melling*, 1 Vent. 225, several cases are cited, to show, that the words "children" and "issue" have been sometimes construed to create an estate tail. In *Moore*, 897, devise by A. to his son for life, and after his decease to the men-children of his body, was held to be an estate tail; and the certificate of ASHHURST and BULLER, Js., in *Griffith v. Harrison*, 4 T. R. 737, and the cases of *Seale v. Barter*, 2 Bos. & Pul. 485, *Doe v. Weber*, 1 B. & A. 713, are authorities to show, that the word "children," in a will, may include grandchildren, and even more remote descendants. Here, too, there are the words "for want of such issue." In *Doe v. Reason*, cited in *Doe v. Holmes*, 3 Wilson, 245, RYDER, C. J., laid it down, that in a will, the word "issue" operates as effectually to make an estate tail, as the words "heirs of the body" do in a deed; and the observations of LAWRENCE, J., in *Watson v. Foxon*, 2 East, 51, and *Pierson v. Vickers*, 5 East, 548, are to the same effect. No case can be found, where, when the word "children," in a devise, under such circumstances, is followed by the word issue, it has not been held sufficient to pass an estate tail. As to the words "sons and daughters," they can make no difference; they only mean, that an estate in tail general, and not in tail special, should pass to the devisees. Taking, therefore, the whole of this devise together, the subsequent words "for want of such issue," show either that the words "child or children" are to be taken as words of limitation, and then John Liversage would take an estate tail, or that they give to him an estate for life, and a remainder in tail to his children. It is true, that, according to this construction, the words "to take as tenants in common, in equal shares and proportions," must be rejected. But in *Pierson v. Vickers* the words "as tenants in common" were rejected, as being inconsistent with the general intent of the will; and so in *Doe v. Applin*, 4 T. R. 82, the words "and amongst" were rejected for the same reason; and *Doe v. Smith*, 7 T. R. 534, and *Doe v. Cooper*.

1 East, 229, and *Doe v. Jesson*, in the House of Lords, are to the same effect. Here, therefore, in order to carry the general intent into effect, the will must be read thus: "To John Liversage for life; and from and after his decease, to all and every the child and children of John Liversage, whether sons or daughters, and for want of such issue, then over." If so, it falls very nearly within the words of *Hodges v. Middleton*, Doug. 431, which is hardly distinguishable from this case. There there was a devise to B. for life, and at her death, to her children; and in case of failure of children, then over; and the Court held, that either B. had an estate tail or an estate for life, with remainder in tail to her children. Either, therefore, in this case, John Liversage took an estate tail or an estate for life, remainder in tail to his children. In either event, there has been no forfeiture, and the defendant is entitled to the judgment of the Court.

ABBOTT, C. J. I am of opinion, that a life estate only passed under the will to the daughters of the testator's nephew, John Liversage. It is very probable that the testator, like many other persons, unacquainted with the law, may have thought that a real estate in fee simple would pass by the same words as would be sufficient to pass the absolute interest in a case of personal property; but in this he laboured under a mistake. In this will there are no words to be found, either connected with the person intended to take, or with the thing devised, so as to show the quantum of interest intended to be given. In the case of *Hodges v. Middleton*, the testator, by his will, bequeathed "all his real estate in the parish of Barking," which showed the quantum of interest intended to pass under the will: but in this will there are no such words; nor are there any words applied to the persons, the objects of his bounty, to show that they were to take an estate of inheritance, as would be the case if the words "heirs of the body" or "issue" had been used. The expressions in the will are "all and every the child and children of the said John Liversage, lawfully begotten or to be begotten, whether sons or daughters, they, if more than one, to take as tenants in common, in equal shares and proportions." I can not say, that under these words, the testator meant to include grandchildren, or more remote descendants. Then there follow the words "and for want of such issue, to my own right heirs;" but these words will not enlarge the estate previously given; for it appears, from the authority of *Hay v. Lord Coventry*, and the other cases cited, that the words "such issue," must refer to the previous words, "child or children." If, indeed, the word "such" had been omitted, it might have been contended, that by implication, an estate tail passed under the will. I am therefore, of opinion, that in this case the plaintiff is entitled to judgment.

HOLROYD, J.* I am of opinion, that by this will, J. Liversage took an estate for life, and that his children took only estates for life, as tenants in common. This is very distinguishable from those cases, where the words of the original limitation were sufficient of themselves to carry an estate tail, and where the only question was, whether they could be controlled by the subsequent words of the will. There it has

* Bayley, J., had left the Court.

been held that the general intention could not be carried into effect, without giving to those words their ordinary signification; and for that reason, the Court have rejected the other words, which were inconsistent with it. But here, there are no such words to be found, unless the words "child and children" are to be considered as nomen collectivum. It may be admitted, that a devise to a man and his children may, in some cases, give an estate tail, if it can be collected that such was the intention of the testator. But it is clear, in this will, that the testator did not use the words "child or children" in that sense, for he speaks of them as sons and daughters, which shows that he only contemplated the immediate descendants of J. Liversage; and he gives them an estate as tenants in common. Nor do the words "for want of such issue," carry the matter further; for they only refer to the words "child or children." I think, therefore, that neither expressly nor by implication, did an estate tail pass by this will.

BEST. J. I am clearly of opinion, that under this will, J. Liversage and his children took only estates for life. It is true, that in some cases, the word children may be taken as equivalent to the word issue; and it was so received in *Seale v. Barter*. But in that case, it seems to me that Lord ALVANLEY gives the key to the determination of the present case. There, the testator had bequeathed all his lands and estates to his son John and his children, lawfully to be begotten; and Lord ALVANLEY, in giving judgment, says: "Now we are of opinion, upon all the authorities, that the words children lawfully to be begotten, in this case are not to be considered as words of purchase, but that the intention of the testator was to give his estate to his son, and the issue of his body generally." In this case, however, it is clear that the words "child or children" are not to be taken as words of limitation, but as words of purchase; for, by the will, they are to take, as tenants in common, in equal shares and proportions. The word children, as it seems to me, therefore, was intended by the testator to be confined to the immediate descendants of John Liversage. If so, the case of *Hay v. Lord Coventry* is in point, and shows that the words "such issue" must be confined to the previous words "child or children," and cannot carry the case further. I am therefore of opinion, that the plaintiff is entitled to our judgment.

Judgment for the plaintiff

COX and Others v. TROY.—p. 474.

When a defendant, having once written his acceptance with the intention of accepting a bill, afterwards changes his mind, and before it is communicated to the holder, or the bill delivered back to him, obliterates his acceptance: *Held*, that he is not bound as acceptor.

ASSUMPSIT upon a bill of exchange for 938*l.*, dated 20th May, 1820, drawn by Stephen and James Roch, upon the defendant and W. T. Roberts, since deceased, by the names and firm of Messrs. W. T. Ro

barts and Co., London, payable 61 days after sight to Michael Murphy, and endorsed by him to the plaintiffs, and alleged to have been accepted by the defendant and W. Tierney Robarts, payable at Messrs. Robarts, Curtis and Co. The first count stated these facts, and a presentment for payment when due, and refusal to pay at Messrs. Robarts, Curtis and Co. The second count was on a general acceptance; and the third was special, stating that the bill was delivered to the defendant and W. T. Robarts, to determine within a reasonable time, whether or not they would accept the same: and that they promised to take due care of the same, and return the same without defacing or spoiling it, which they did not do, but returned the same bill in a defaced and injured state. The declaration also contained the usual money counts. Plea, general issue. The cause was tried at the sittings after Trinity term, 1821, before ABBOTT, C. J., when a verdict was found for the plaintiffs, subject to the following case. It was admitted on the trial, that the bill of exchange mentioned in the declaration was drawn by Messrs. T. and J. Roch on the defendant and W. T. Robarts, since deceased, as stated in the declaration, and that the same was duly endorsed to the plaintiffs by the payee. The plaintiffs in London received the bill from Cork, on the 24th May, 1820; and on the same day their clerk, by their directions, left it for acceptance at the defendant's counting-house in Old Broad-street, London, in the usual way. He did not call for it until Saturday, the 27th May, upon which day one of the defendant's clerks delivered back the bill of exchange to him without any observations being made at the time. The words "24th May, 1820, at Messrs. Robarts, Curtis and Co., W. T. Robarts and Co." were written upon the bill by the defendant, or some one authorized by him, whilst the same was in his custody: and the jury found by their verdict that the defendant and the said W. T. Robarts did accept the bill of exchange: but at the time the clerk re-delivered the bill of exchange to the clerk of the plaintiffs, the words "24th May, 1820, at Messrs. Robarts, Curtis and Co., W. T. Robarts and Co.," were inked and written over, so as with great difficulty to be decyphered. The defendant did not offer any evidence to account for the obliteration of the acceptance. The bill itself was not obliterated, or any part of it rendered illegible.

Chitty for the plaintiff. In this case the acceptance, when once made, could not be revoked by the defendant. It is so laid down in *Marius*, p. 83, although that is only a loose dictum. But in *Molloy*, book 2, c. 10, s. 28, it is said, that when a party has once subscribed, he cannot afterwards blot out his name. And the *Hamburg* ordinance lays it down in general terms, that an acceptance once made cannot be revoked. *Trimmer v. Oddy*, cited in *Bentinck v. Dorrien*, 6 East, 200, *Chitty* on Bills, 160, S. C., is an authority in point. There Lord KENYON was of opinion, that if a drawee deface the bill, that makes him liable as acceptor; and in *Thornton v. Dick*, 4 Esp. 270, this point was expressly ruled by Lord ELLENBOROUGH. It seems also to have been considered as the law in *Bentinck v. Dorrien*, and in *Fernandey v. Glynn*, 1 Campb. 426, n. And it is treated as the law of France

at the present day by Pardessus, a modern writer.* In *Adams v. Lindsell*, 1 B. & A. 681, the defendant was held to be bound by the plaintiff's acceptance of the contract, although not communicated to him. Here the jury have found that there was once an acceptance by the defendants, and that being so, they had no right afterwards to revoke it.

Denman, contra, was stopped by the Court.

ABBOTT, C. J. I am of opinion, that, in this case, the defendant is entitled to judgment. It is true, that the jury have found that he did accept the bill; but connecting that finding with the other facts of the case, it does not seem to me that it means more than that, at one period, the defendant, or some one in his behalf, did write an acceptance on it, and at that time was minded to accept it. The question will then be, whether having that intention at the time, and having written his acceptance, he was at liberty, on an alteration of circumstances, to erase those words, before he delivered out the bill to the holder. Upon that question, there appears, in the books, to be some difference of opinion. In *Bentinck v. Dorrein*, LAWRENCE, J., says, "When the general question shall arise, it will be worth considering how that which is not communicated to the holder, can be considered as an acceptance, while it is yet in the hands of the drawee, and where he obliterates it before any communication made to the holder." That expression was used after the decision, in the cases of *Thornton v. Dick* and *Trimmer v. Oddy*. And at a later period, in *Raper v. Birkbeck*, 15 East, 20, Lord Ellenborough says, "I remember Pothier, in his treatise on bills of exchange, speaking of an acceptor who has put his signature to a bill, but has not parted with it, says, that before he does part with it, 'il peut changer de volonté, et rayer son acceptation;' a fortiori, then a third person who cancels an acceptance by mistake, shall not be held thereby to make void the bill, but shall be at liberty to correct that mistake, in furtherance of the rights of the parties to the bill." The manner in which Lord Ellenborough quotes the treatise of Pothier, seems to indicate, that, at that time, he did not retain the opinion which he had delivered in the case of *Thornton v. Dick*. In a case like the present, which depends on the law-merchant, the opinions of learned lawyers and the practice of foreign and commercial nations, though they cannot strictly speaking, be quoted as authorities here, yet are entitled to very great weight and attention. When I find, therefore, that it is laid down in Pothier's treatise, that a party who has given an accep-

* The passage referred to is in the *Cours de Droit Commercial*, by J. M. Pardessus, Paris, 1814, part 2, tit. 4, chap. 4, sect. 4, s. 1, p. 400. This writer, speaking of the effect of an acceptance, says: "Elle est irrévocable, et celui qui l'a donnée ne saurait pas libre de la rayer, même du consentement de celui sur la présentation duquel la lettre auroit été acceptée, parce que l'acceptation n'oblige pas simplement l'accepteur envers le porteur; qu'elle forme également un contrat entre le tireur et l'accepteur." In the next paragraph, the same learned writer says: "Cependant comme le bonne foi doit être avant tout considérée, et que la seule crainte de la fraude ne doit pas empêcher des opérations légitimes, le tiré qui auroit trop précipitamment accepté, et voudrait révoquer son acceptation avant que la lettre qui en est revêtue circule, pourroit la rayer et assurer la date et l'existence de ce changement par un protêt, ou par tout autre acte semblable, qui ne permettroit pas de croire que jamais la lettre ait circulé revêtue de l'acceptation non rayée."

tance may erase it before the bill goes out of his hands, it affords a strong argument in support of the view which I take of the question. I think the rule there laid down is far better than the one contended for by the plaintiff. I cannot perceive how the holder of a bill, or any antecedent party, is prejudiced by it; for it is to him the same thing, whether when the drawees give it back, they deliver it to him unaccepted, or whether he finds that the drawees have withdrawn their acceptance, having at one time intended to accept it, but having subsequently changed their mind. Thinking, as I do, that no prejudice can arise to the holder, or any other parties to the bill, and that they are placed in precisely the same situation as if no acceptance was given, it seems to me, that it was competent for the acceptors to erase their acceptance before they delivered out the bill, and therefore that the defendant is entitled to our judgment.

BAYLEY, J. I am of the same opinion. By the bill the drawer requires the drawee to come under an engagement to pay it when due. The question is, when the drawee comes under an engagement, whether by the act of writing something on the bill, or by the act of communicating what has been written to the holder, and I have no difficulty in saying, from principles of common sense, that it is not the mere act of writing on the bill, but the making a communication of what is so written, that binds the acceptor; for the making the communication is a pledge by him to the party, and enables the holder to act upon it. But while it remains in the drawee's hands, it seems to me, the acceptance is not fully binding on the person who signed it, and he is at liberty to say, before he parts with it, "I have not yet entered into an engagement to accept."

HOLROYD, J. I also think, that in this case the party was at liberty to cancel his acceptance prior to the time when the bill was delivered back. In the old books there are dicta which import that an acceptance once made cannot be revoked. In some of them it is said, any thing which amounts to an assent to pay the bill, whether in writing or otherwise, is in point of law an acceptance; and I suppose it has been on that principle, that the case of *Thornton v. Dick*, was determined; but the two subsequent cases seem to show that Lord Ellenborough had doubts as to his former opinion. In *Fernandey v. Glynn*, the cancelling of the cheque was with the view and under the idea that it would actually be paid, and in that case it was probably contended, either that the crossing or cancelling the bill amounted to actual payment, so that an action for money had and received would lie for the amount against the bankers, or that if not, yet it was to be considered in the nature of an acceptance. Now that case seems to me to apply strongly to the present; for there according to the usage, if a cheque was intended to be paid, it was cancelled, but if not, nothing was done, but it was returned to the parties from whom it was received. And when the cheque in that case was cancelled, it was done with the intention of payment, and not really by mistake. In consequence, however, of the large payments made in the course of the day, on account of the drawer, the bankers changed their intention; yet there the cheque was

delivered back, and the original drawer only was considered bound to pay it. The opinion of Pothier, stated in *Raper v. Birkbeck*, is precise on this subject, and is far better authority than the passages cited from Marius. Where a man accepts a bill, and delivers it out accepted, he must remain irrevocably bound by it. In contracts made between parties at a distance, if a man writes his acceptance, and sends it out of his hands, he cannot revoke it afterwards. I am satisfied, however, that this is not a binding acceptance on the party, having been cancelled anterior to the time when the bill was delivered back.

BEST, J. This is a question on the law-merchant, and it is desirable, that that law should be the same in this as in every other commercial country. We ought, sitting here, to act according to the judgments of the courts in our own country, but in the absence of these authorities, we may with great advantage take into our consideration the opinions of learned writers on this point. There seems to be no authority in the English law, except the case of *Thornton v. Dick*. I agree with my Lord C. J., that Lord Ellenborough seems to have changed the opinion which he is reported to have delivered in that case. The passage in Molloy is probably applicable to the case where the bill has been delivered out, for it does not speak of cancellation, but revocation. But the authority of Pothier is expressly in point. That is as high as can be had, next to the decision of a court of justice in this country. It is extremely well known that he is a writer of acknowledged character; his writings have been constantly referred to by the Courts, and he is spoken of with great praise by Sir William Jones, in his *Law of Bailments*, and his writings are considered by that author equal in point of luminous method, apposite examples, and a clear manly style, to the works of Littleton on the laws of this country. We cannot, therefore, have a better guide than Pothier on this subject. As to the opinion of Pardessus, I should understand him as rather speaking of bills delivered out, accepted, and not erased. That seems to me perfectly clear from the next passage, where he says, that, though a man does accept a bill, still if he cancels that acceptance before he delivers it out, that is sufficient. But considering this as a question merely of common sense, and judging by analogy, is it not clear that the party is not bound in such a case as this? It may be said, that the defendants here ought to have shown that this was done by mistake. How is it possible to do that? The thing looks like mistake. He may have written an acceptance, and afterwards find when he has written it, that it is on the wrong paper; and not meaning to accept that bill, he does that which shows, that it was his intention not to enter into such a contract. Nobody can be injured by it. When the bill goes back it is in as good a state as it came. The party is still placed in the same situation. It appears to me, therefore, not only on authority, but on the principles of common sense, that the defendant was not bound by this as an acceptance, and that our judgment ought to be in his favour.

Judgment for the defendant.

Ex parte HUGHES.—p. 482.

Where an attorney, in order to get possession of papers belonging to A. B., in the hands of A. B.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that A. B. should enter into an unqualified reference, not revocable, &c.: *Held*, that A. B. having become subsequently bankrupt for the second time, and without paying 15s. in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 G. 3, c. 121, s. 14, so as to dispense with the reference, and that the attorney was liable, pursuant to his undertaking, to procure A. B.'s signature to an agreement to reference, and to find security for the performance of the award to the satisfaction of the master.

SCARLETT, in Easter term, 1820, obtained a rule nisi, calling on John Garnett, an attorney of this Court, to show cause why he should not name an arbitrator, and procure Hugh Emmett, his client, to execute an agreement of reference, and find security to the satisfaction of the master for Emmett's performing the award. It appeared that Emmett had been in trade in partnership at Liverpool, and being indebted to Hughes, who had formerly been his attorney, for professional business done by him, and there being a dispute as to the amount, a reference between them was proposed. At that time, Hughes having papers belonging to Emmett in his hands, of which Garnett, who was then Emmett's attorney, wanted to get possession, the latter undertook in writing, that Emmett should enter into an unqualified reference, as to the matter in dispute between him and Hughes, which reference was not to be revocable by Emmett, provided Hughes would give up the papers. This was accordingly done. On showing cause, the affidavits were ultimately referred to the master, who reported as follows: "I find that Mr. Garnett is liable under the guarantee given to Mr. Hughes, and I direct that Mr. Garnett shall, before the first day of February next, procure Mr. Emmett to execute the agreement of reference as heretofore prepared, or execute the same as the attorney of Mr. Emmett, and shall also, before the said first day of February next, find security to my satisfaction for performance by the said Emmett, of the award to be made in pursuance thereof, unless the Court shall be of opinion, that Mr. Garnett is discharged from his liability under the following circumstances. Mr. Hughes, without the consent of Mr. Garnett, proved a debt of 100*l.* under a second commission awarded against Emmett, and dated 11th September, 1820, and had a claim reserved for a further sum against Emmett's separate estate under that commission, Mr. Hughes, in his proof, excepting the undertaking of Mr. Garnett. Mr. Hughes also tendered a proof of a debt of 249*l.* 15*s.* 3*d.* against Emmett as partner with one Monkhouse, also excepting the said guarantee of Mr. Garnett, but such proof was objected to by Mr. Garnett, as solicitor to the commission, as being a joint proof. The undertaking of Garnett was given after the date of the first, and before the date of the second commission, and Emmett, under that commission, has not yet paid 15*s.* in the pound. No part of the debt has been paid or offered to be paid by Mr. Garnett."

Littledale contended, that the proof under Emmett's commission dispensed with the necessity of any reference, having amounted to an

election under the 49 G. 3, c. 121, s. 14, and that, therefore, Garnett was not liable under this guarantee. Here too, this was a second bankruptcy, under which 15s. in the pound was not paid, and therefore, if Hughes had not proved under the commission, Garnett might have brought an action against Emmett for the money paid by him as surety, under which action he might have made his future effects liable; and he cited *Meade v. Braham*, 3 M. & S. 91.

Per Curiam. It was the duty of Garnett to have paid the debt before the proof of Hughes under the bankruptcy, or at all events, to have given Hughes notice not to prove, if he thought that would be a disadvantage to himself. If, therefore, any inconvenience arises to him in respect of the proof made by Hughes, his own neglect was the cause of it. Here, Hughes had Emmett for his debtor and Garnett as the surety, and he therefore had a full right to prove under Emmett's commission. Besides, the legislature consider the proof against the principal as a benefit to the surety, by relieving him pro tanto from the debt. The rule must therefore be made absolute.

Rule absolute.

Scarlett and Parke were to have supported the rule.

The KING v. The Justices of NORFOLK.—p. 484.

When an order of removal has been executed and by consent of the removing parish and the magistrates making it, it is superseded, and the paupers taken back, it is in the discretion of the sessions to enter an appeal against it or not, according as they may think that justice requires it, in order to compel the respondents to pay the costs of maintenance, &c., incurred by the appellants before the order was superseded.

COOPER, in last Michalmas term, obtained a rule nisi for a mandamus to the defendants, commanding them to enter continuances, and hear the appeal of the churchwardens and overseers of the parish of Little Hautboys with Lammas, in Norfolk, against an order of two magistrates for removing Hannah, the wife of Edward George (then a prisoner in the house of correction at Aylsham in that county, convicted of larceny), and her family from the parish of Repps with Bastwick to Little Hautboys with Lammas. It appeared, that the removal had taken place on 22d August last, and that on the 5th September following, notice of appeal was given. On the 10th October, a superseas, under the hands and seals of the removing magistrates, was served on the officers of the appellant parish, stating, that doubts had been entertained whether the order could be supported by legal evidence, and requiring them to deliver up the duplicate order to be cancelled, and also requiring the other party to take back the pauper. It appeared, that this was done at the instance of the respondents, the order of removal having been founded on the examination of Edward George, taken under 59 G. 3, c. 12, s. 28, and that, he being a prisoner convicted and under sentence for larceny, his examination was not evidence, he himself not being an admissible witness until the expiration of his sentence. It did not appear on the affidavits, whe-

ther the costs of maintenance between 22d August and 10th October, had been paid or tendered by the respondents. On the 17th October, application was made to the sessions for leave to enter the appeal, which was refused, the Court being of opinion, that the order was completely at an end.

E. Alderson showed cause. It is obvious that this removal took place under a mistaken construction of the 59 G. 3, c. 12, s. 28, which must of course be confined to the examinations of such persons in custody, as are in other respects admissible witnesses. As soon as this mistake was discovered, the order was superseded, and *Rex v. Diddlebury*, 12 East, 359, is an authority to show, that, even after the execution of an order of removal, the justices may, with the consent of the respondents, supersede it: and the consent of the appellants is not necessary. The only object of this motion is, to prevent a trial on the merits; for if the writ of mandamus is now to issue, the respondents will be compelled to try the case without the evidence of George, who, as soon as his term of imprisonment is over, will be a competent witness.

Cooper, contra, relied upon *Pancras v. Rumbold*, 2 Bott. 631, as showing the distinction, that, though the justices may supersede an order before, they cannot do so after it is executed; besides, here the appellants have been compelled to provide for the paupers from the 22d August up to the 10th October; and if this be allowed, it will entail great hardship upon parishes, for justices may remove paupers immediately after one sessions, and supersede their order immediately before the next. As to the objection that the merits cannot be tried whilst George remains in prison, that is not important, because it is in the power of the sessions to respite the appeal from time to time, until he becomes a competent witness.

BAYLEY, J. This is a very different case from *Pancras v. Rumbold*, which is only an authority to show that the justices having been surprised into making an order, may of their own authority, and without the consent of the removing parish, supersede it before execution, but not after. But in this case, there is the consent of the removing parish. The language of Lord ELLENBOROUGH, in *Rex v. Diddlebury*, puts it upon that very ground, for he says, "there are two ways of getting rid of an order, one by consent of the parish in whose favour it is made to obtain it, the other by appeal;" and he adds afterwards, "what objection can there be, as Lord MANSFIELD observed, in the case of *Rex v. Llanrhydd*, to a party's abandoning a judgment intended for his own benefit?" These observations show that the consent of the removing parish alone is requisite. I think, that in cases like this, the sessions may exercise a discretion, and enter the appeal or not, so as best to answer the purposes of justice. If the parties removing do not choose to pay the expenses of maintenance incurred, previously to the supersedeas, they may then enter the appeal, for the purpose of compelling them so to do. If they are willing to do it, the sessions may refuse to enter the appeal. Here the only object of entering it, would be, either to obtain a decision from the sessions, in the absence

of a material witness, or to respite the appeal from time to time. In the latter case there would be a useless expense entailed upon the parties. As soon as George is discharged from prison, a new order may be made; and it is better for the appellants that it should be so, for they will not be compelled to keep the family in the mean time. I think, therefore, that it was entirely in the discretion of the sessions to enter the appeal or not, and I do not see any ground why this Court should interfere with their decision. This rule must therefore be discharged.

BEST, J. The principle upon which this Court proceeds in issuing the writ of mandamus is to prevent a failure of justice. Here the very reverse would be the effect. For we should either compel the sessions to hear the case in the absence of the person who can give the most material information, or put the parties to the useless expense of obtaining respites from time to time, till his imprisonment be over.

Rule discharged.*

* Abbott, C. J., and Holroyd, J., had left the court.

The KING v. LANE.—p. 488.

Where, in an application for a quo warranto against a constable, the affidavits in support of the rule stated, that for 50 years back, and as long as deponents could recollect, there had been a custom in the town to elect a constable in a particular mode, but did not expressly state that they believed such custom to be immemorial: *Held*, that it was not sufficient.

J. Williams, in last Michaelmas term, obtained a rule nisi for a quo warranto against the defendant, as constable of the township of Fails-worth, in the county of Lancaster. The affidavits stated, that for 50 years and upwards, and as far back as the deponents could recollect, it had been the usual and established custom for the constable to be elected by the payers of rates at a meeting for that purpose; and that, at a meeting so held on the 3d October last, Joseph Lancashire was appointed; but that notwithstanding, the deputy-steward of the courtleet of the wapentake of Solford had sworn in the defendant as constable for the year. But none of the deponents expressly stated, that to their belief there had been immemorially such a custom in the town.

Cross, Serjt., and *Tindal* were about to have showed cause, when the Court called upon *J. Williams* to answer the preliminary objection, that no immemorial custom was stated in the affidavits. He contended that it was sufficient if facts were there stated from which a jury would necessarily draw that conclusion; and that such facts were stated in this case.

Per Curium. It is necessary on the face of the affidavits to state, that there is, as the witnesses believe, an immemorial custom to elect in this way; and it is not enough to state facts from whence the conclusion may be drawn, for it may be consistent with these affidavits that

the parties making them may know when the custom originated. In the case of *Rex v. Standard Hill*, 4 M. & S., 378, which was an application to have overseers appointed for a vill, it was held to be necessary, to swear positively that it was a vill by reputation.*

Rule discharged.

* See *Rex v. Williamson*, 3 B. & A. 582.

TAYLOR and Another, Assignees of WELSH, a Bankrupt, v. HIPKINS and GREGORY.—p. 489.

In order to save the statute of limitations, it is sufficient that the writ be sued out, and the return thereon endorsed upon it in time. It is not necessary that the writ should be delivered out of the sheriff's office as returned.

On the 4th of June, 1812, while the defendant Gregory was abroad, a writ of special capias, at the suit of the plaintiffs, issued against the two defendants, as co-partners, returnable on the morrow of All Souls, endorsed for bail for 1000*l*. On the 11th December, 1812, an alias special capias issued, returnable in fifteen days of St. Martin in Michaelmas term, 1812, and a pluries, returnable in eight days of St. Hilary, 1813. Hipkins died in September, 1813. On the 17th March, 1821, the plaintiffs struck a docket against Gregory, and he was declared a bankrupt, but having resisted the commission, the Vice Chancellor made an order, that he should be at liberty to try its validity in an action of trover to be brought against the assignees. At that trial Gregory proved that he was in England in April, 1814, and his counsel insisted, that there was no valid petitioning creditor's debt, inasmuch as it was barred by the statute of limitations; but the jury found a verdict against him. Copies of the several writs, with the continuances, were given in evidence on the part of the plaintiffs, and the point was reserved as to the legal effect of those proceedings. It was stated in the affidavits, on the part of Gregory, that these writs were not delivered out of the secondary's office before the 19th March, 1821, which was two days after the above action was commenced. They were all filed together on the last day of Trinity term, in the King's Bench treasury, and a roll of the proceedings, with the continuances on the writ of pluries, was carried in and docketed on the 11th July, 1821. It appeared now, upon the affidavits produced on the part of the plaintiffs, that the writs were left at the secondary's office, between the beginning of Michaelmas term, 1812, and end of Hilary term, 1813, for the purpose of being returned by the then sheriffs; and that before the end of that term, a return was endorsed, that neither of the defendants was to be found in the bailiwick. *Campbell*, on behalf of the defendant, Gregory, in last Michaelmas term, obtained a rule nisi for setting aside the return to the special capias, alias and pluries in this case, for irregularity, with costs. The Court, after hearing *W. E. Taunton* against the rule, and

Campbell and *E. Alderson* in support of it, ordered it to be referred to the Master, to inquire, whether, according to the practice of the Court, these writs had been duly returned and filed, so as to save the statute of limitations; and the Master having now reported that they had been duly returned for that purpose,

Campbell now excepted to the report, and contended, that a writ was not duly returned by having a return endorsed upon it, but by being delivered out of the secondary's office as returned. Here, therefore, no return was made till the 19th March, 1821, a period after the statute of limitations had actually run. In this case, then, when the docket was struck, the petitioning creditor's debt was barred by the statute, and the validity of the commission is to be made subsequently to depend upon the will of the under-sheriff, in delivering or refusing to deliver out the writs; it being clearly in his power, after the sheriffs have been six months out of office, to refuse to make any return to the writs. In *Harris v. Woolford*, 6 T. R. 617, it was held, that, in order to save the statute of limitations, it was necessary to show, not only that a writ was sued out in time, but also that it was returned.

The Court, however, thought, that there was no good reason for altering the established practice, which was, to consider such returns as regular, and the rule was discharged.

Rule discharged.

DOE, on the Demise of THOMAS NETHERCOTE, v. FRANCIS BARTLE.—p. 492.

By marriage settlement certain lands were limited to the husband for life, remainder to the wife for life and remainder to their issue. Afterwards certain freehold land in the same parish descended to the husband in fee. There was no issue of the marriage, and the husband being in possession of the freehold lands under the settlement, and the other land of which he was seized in fee, devised to his wife for life all his freehold and copyhold land of which he was then in the immediate possession, and also all his reversionary estate, expectant on the death of his mother, in certain other lands therein mentioned, and after the decease of his wife, he devised the same to his daughter in fee, and all other his real and personal estate he devised to his wife, her executors and administrators: *Held*, that the freehold land which the husband held under the settlement, passed under the particular devise in the will to the wife for life, and after her death to his daughter in fee, although the wife would have taken the same estate in those lands under the settlement. Where, by the custom of a manor, a feme covert was allowed by will to pass her copyhold lands, the same having previously been surrendered by husband and wife, (the wife having been examined separate and apart from her husband, and consenting thereto,) to use of her will; and a feme covert being seized of copyhold lands in the manor, made her will subsequently to the 55 G. 3, c. 192, and there was no surrender to the use of her will: *Held*, that the copyholds did not pass by the will, the 55 G. 3, c. 192, having only supplied the want of a formal surrender, and the surrender in this case being matter of substance, and requiring to be accompanied by the separate examination of the wife.

EJECTMENT, to recover ten acres and a half of arable land, in the parish of Soham, in the county of Cambridge, three acres, part thereof, being copyhold of the manor of Mildenhall, and the residue freehold. At the trial, before DALLAS, C. J., at the Summer Assizes, 1821,

the jury found a verdict for the plaintiff, subject to the opinion of the Court, on the following case :

Thomas Nethercote (the great uncle of the lessor of the plaintiff) being seized in fee simple of six acres and a half, part of the freehold lands above mentioned, by an indenture of the 2d October, 1741, settled the same to the use of himself for life, with remainder to the use of Mary his wife, for life: remainder to the use of the heirs of his body, on the body of the said Mary to be begotten. After this settlement, the remaining acre of freehold descended to him in fee simple. On the 19th of February, 1758, (being then in possession of the said six and a half acres under the settlement, and also of other land in the same parish, of which he was seized in fee,) he made his will, and devised as follows: "I devise unto Mary, my wife, all my freehold and copyhold lands, of which I am now in the immediate possession, lying in the several parishes of Soham and Fordham, in the county of Cambridge, and also all my reversionary estate, expectant on the death of Mary Nethercote, my mother, of and in certain other freehold and copyhold messuages, lands, &c., situate in Soham and Fordham aforesaid; to hold the said freehold and copyhold premises unto my wife, and her assigns for her life, (charged as in the will mentioned;) and after the decease of my wife, then I devise the said freehold and copyhold messuages, lands, &c., unto my daughter, Mary Nethercote, her heirs and assigns for ever. And all other my real and personal estate, subject to the payment of my funeral expenses and just debts, I devise and bequeath unto my said wife, her heirs, executors, and administrators."

T. Nethercote died soon after making his will, leaving Mary Nethercote, his widow, and Mary Nethercote, his daughter and only child, him surviving. The daughter, who survived the mother, afterwards married William Chatteris, and died in 1790, leaving issue one child only, viz. Mary, afterwards the wife of Robert Young. Upon the death of her mother, Mrs. Young entered into the possession of the freehold lands, and continued seized thereof till her death. The copyhold land descended to Mrs. Young from her mother, and she was admitted thereto in fee simple, according to the custom of the manor of Mildenhall. After her marriage she made her will, bearing date the 29th of January, 1817, by which, with the consent of her husband, testified by his signature thereto, she devised all her copyhold lands in the manor of Mildenhall, to which she had been admitted (which included the copyhold lands in question) to William Pollet Chatteris and his heirs, for ever, and in case of his death under age, then to her husband and his heirs, for ever. The will was signed both by Mr. and Mrs. Young, in the presence of, and attested by three witnesses, but there was no surrender passed to the use of Mrs. Young's will. In the manor of Mildenhall, there is a custom enabling a feme covert to pass by her will copyhold lands which have been surrendered to the use of the wife's will, by the husband and wife, the wife being examined by the steward, separate and apart from the husband, and consenting. The lessor of the plaintiff is the heir at law *ex parte materna* of Mary Young on the part of her grandfather, but not on the part of her grandmother, and the heir, according to the cus-

tom of the manor of Mildenhall, of Mrs. Young. The question for the opinion of the Court as to the six and a half acres of freehold, was, whether they were included in the particular devise in the will of Thomas Nethercote, and passed under that devise to his wife, for life, and after her decease to his daughter, in fee. And as to the copyholds, whether by virtue of the act of the 55 Geo. 3, c. 192, the will of Mrs. Young was effectual to pass them, though there had been no surrender to the use thereof.

Biggs Andrews, for the lessor of the plaintiff. The freehold land passed, under the particular devise in this will, to the wife for life, and after her death, to the daughter in fee, and consequently the lessor of the plaintiff, as the heir-at-law of Mrs. Young, is entitled to recover. The question is not between the devisee and the heir, but between two devisees. By the particular clause, the testator devises the lands of which he is in the immediate possession. Now he was in the immediate possession of the freehold land in question, and consequently, there can be no doubt that this land would pass under this clause, had it not been that the wife took the same interest, and the daughter nearly the same interest under the settlement. That circumstance, however, is not sufficient to show, that the testator intended this land not to pass, where the words of the particular clause are clear and unambiguous. Besides, there is no inconsistency between the settlement and the will, for the testator had the full control over the fee, with the exception of the life estate to his wife, and he might therefore naturally suppose, that he might devise it, subject to that estate, as he pleased. The will, as far as it relates to the only interest which was not in the testator, is confirmatory of the settlement. It is clear, that these lands would not have passed by a devise of "All the lands of which the testator was *not* in the possession." And if so, they must pass by the devise in this will, of "All the lands of which he *was* in the possession." The question as to the copyhold premises, depends upon the 55 G. 3, c. 192. The preamble of that statute recites, that by the custom of certain manors, copyhold estates of such manors passed by the last will and testament of the copyhold tenants thereof, declaring the uses of surrenders made for that purpose, and that much inconvenience had arisen from the necessity of making such surrenders; and then it enacts, that where any copyhold tenant of such manor may by will dispose of his copyhold tenements, the same having been surrendered to such uses as should be declared by the will, every disposition made by such will shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the will of such person, as the same would have been if a surrender had been made." The legislature intended to supply a surrender which the person making the will might have made, but which, through accident or ignorance, had been omitted. It did not intend to give to individuals powers over their estates which they did not possess before; now, it is part of the policy of the law, that a feme covert shall not make any disposition of her real property but under certain regulations. First, she cannot dispose of it without the concurrence of her husband, for a fine levied by a married woman, described as such, is

altogether void. Secondly, the law has provided, that she shall not be controlled by her husband to make an improvident disposition of her property against her own will; and therefore the wife must be examined apart from her husband, in order to give effect to any transfer of her property. A feme covert, therefore, cannot dispose of freehold property, except by a matter of record to which her husband must be a party, and she cannot become a party to it, until she has been previously examined apart from her husband. If the construction contended for by the defendant is to be put upon this statute, however, a feme covert may dispose of copyholds by an unattested writing, made either without the concurrence of her husband, or induced by his threats or control. The legislature never could have intended to have made so important a distinction between freehold and copyhold property. The statute does not say, that the consent of the husband, or the private examination of the wife, shall be supplied, but merely that the surrender shall be supplied. Here, before the passing of the act, both these things were necessary to give effect to the will, and therefore, unless this case be within the statute, the will cannot operate upon the copyhold property. The third section of the act, however, is quite conclusive upon this point, for it provides, "that nothing therein contained shall be construed to render valid or effectual any devise or disposition of any copyhold lands, &c., which would be invalid or ineffectual, if a surrender had been made to the use of the will of a person attempting to dispose of the same by a will." Now, in this case the feme covert could not by a mere surrender, without the concurrence of her husband, and without a previous examination, have made an effectual devise of copyholds, and therefore this will is not rendered valid by the act.

Dover, contra. The reversion of the settled property did not pass under the particular devise to the daughter in fee, but to the wife of the testator under the general residuary clause; and if that be so, the lessor of the plaintiff, who is not the heir at law of the wife of the testator, is not entitled to recover. The words, "of which I am in the immediate possession," are a description of the interest which the testator had in the lands intended to be devised by him, and do not refer to the actual occupation or possession of the land under his life estate. The words of a will must be construed in their legal sense, unless a contrary intent plainly appear, *Holloway v. Holloway*, 5 Ves. junr. 401, and the testator must, *primâ facie*, be presumed to know the law as well as another, *Purefoy v. Rogers*, 2 Saund. 385. If there had been any ambiguity in the words themselves, it is wholly removed by other words of the sentence, for the testator, after giving the lands of which he was in immediate possession, devises a reversionary estate expectant on the death of his mother, to his wife for life, and to his daughter in fee. Now, in the legal sense of these words, the reversion was not in the immediate possession of the testator: it was vested in interest, but not in possession. Estates in possession are here put in direct opposition to estates in reversion by the testator. It is quite clear, therefore, that the testator did not intend, that the reversion should pass by this clause, for if he had intended it, he would have

devised it in express terms. By this construction, full effect will be given to all the words of the will. The testator had, besides the settled property, other lands in the same parish, of which he was seised in fee. Of that he was, in every sense, in the immediate possession, and that land alone, he intended to devise to his wife for life, and to his daughter in fee. But if the construction contended for on the other side prevail, then the testator must be taken to have given to his wife the same estate in that land which she already possessed under the settlement, viz. a life interest. It is clear, that the reversion passed by the residuary clause, *Chester v. Chester*, 3 Peere W. 55, *Doe dem. Lord Cholmondely v. Weatherby*, 11 East, 327. Besides, if the residuary clause is not to operate upon this reversion, there is no estate upon which it can operate. Then, as to the copyhold, this is a case in which the want of a surrender is supplied by the 55 G. 3, c. 192. The words of the first section are very large and comprehensive, and are clearly sufficient to comprise the present case. In *Taylor v. Phillips*, 1 Ves. 229, it was doubted whether a surrender by a wife in her husband's presence was not good, although it did not appear that she was separately examined. In this case the husband signed, and was a party to the will; and it is not necessary that the wife should be examined, for that is a mere matter of form. The surrender and the will are not concurrent acts. The surrender may be made years prior to the will, yet the examination must take place prior to the surrender, and the steward can know nothing of the will which is not in existence. Such a surrender passes no interest at the time, and is very different from a surrender of one to the use of another person, which takes effect immediately, and cannot be revoked. In the latter case, the examination is matter of substance, for a wife, under the influence of her husband, might otherwise sell her estate during her life, and deprive herself of support during widowhood. Such surrenders, however, are not affected by the statute. But in this case, nothing passes during her life, she only exercises a power with the consent of her husband, which she herself possessed before marriage. The *jus proprietatis* after the marriage is in her, and the *jus possessionis* in her husband, and they are both parties to the appointment. Before the 55 G. 3, c. 192, frequent applications were made to courts of equity to supply surrenders, and great litigation followed, and the object of the act was to remedy this inconvenience, by making one general and uniform rule applicable to surrenders in all testamentary cases. And the words of this act are sufficiently large to include all.

Andrews, in reply, was desired by the Court to confine himself to the first point. The defendant is not assisted by taking the words "of which I am in the immediate possession," to refer to the interest which the testator had in the lands, and not to the actual occupation. The testator was in the immediate possession of an estate for life in the lands, and they must therefore be included in the words of this particular clause, even under that interpretation of them. No argument is furnished for the defendant, from the testator's having given another reversionary interest; in express terms, because whether this reversion passed by the particular or the residuary clause, it must be held to

have passed by a devise of the lands themselves. It is true, that if these lands did not pass by the particular, they passed by the residuary clause; but the words of the particular clause are sufficiently comprehensive to pass them, and it cannot be shown that the testator meant not to include them in that clause.

ABBOTT, C. J. I am of opinion that the plaintiff is entitled to recover both the freehold and the copyhold lands. The question, as it regards the freehold, depends entirely upon the construction of the particular will; the question, as it regards the copyhold, is one of general and extensive importance. The words of the particular clause in the will are these: "I devise unto Mary, my wife, all those my freehold and copyhold lands, &c., of which I am now in the immediate possession, lying in the several parishes of Soham and Fordham." I am quite satisfied that these words are sufficient in themselves to comprise the freehold land in question. There could have been no doubt indeed upon the subject, if the person designated *to take* had not been the same person who would have taken under the settlement; it appears to me, however, that the words of description are not to receive a different construction, on account of the character of the person to whom the gift is made. I am by no means clear, that the testator meant to convey the freehold land by the residuary clause, and that being so, I think that we are bound to give effect to the clear and unambiguous words of the particular clause. As to the copyhold, I agree with the counsel for the defendant, that the words of the 55 G. 3, c. 192, are large enough to comprise the present case; but it does not thence necessarily follow that the statute does comprise this case. It is laid down by Lord Coke, 2 Instit. 386, "That a case out of the mischief intended to be remedied by a statute shall be construed to be out of the purview, though it be within the words." Now I am quite satisfied that this case is out of the mischief intended to be remedied. The statute recites, "that by the custom of certain manors, copyhold estates of such manors passed by the will of copyhold tenants thereof, declaring the uses of surrenders made for that purpose, and that much inconvenience had arisen from the necessity of making such *surrenders*;" the enactment, therefore, was to prevent that inconvenience which had been found to arise from the necessity of making such surrenders. Now, no inconvenience had been found to arise from the necessity of making a surrender, in order to give effect to the will of a married woman, where it was a part of the custom of the manor that she was to be examined by the steward. The inconvenience contemplated by the statute, was the necessity of a surrender by an adult, not under any legal incapacity, in order to render a devise by him of copyhold effectual. In the latter case, the surrender is mere matter of form and ceremony. Here, the surrender is mere matter of substance. I am of opinion, that the legislature intended by this statute to supply the want of a mere formal surrender only. If we were to hold that the statute extended to a case like the present, we would be introducing, instead of remedying a mischief: for I consider the separate examination of the wife, at the time of the surrender, by the steward, according to the custom of the manor, as a guard and protection which the law has provided, to prevent

the wife from making an imprudent will under the control of her husband. That protection is not, perhaps, so necessary in the case of a will as in the case of an immediate sale. In the latter case, the wife deprives herself of all present and future means of subsistence; but although that is not so in the case of a will, she is still entitled to that protection which the law allowed her, to prevent her being compelled by her husband to make an improvident disposition of her property in favour of himself or those connected with him. I think that if we were to put the construction contended for on this statute, we should deprive feme coverts of that protection which the law generally extends to them with respect to their freehold property, and which, by the custom of this and most other manors, is expressly allowed them with respect to their copyhold property. I am therefore of opinion, that although this is a case within the words of the statute, it is not within the mischief intended to be remedied, and therefore is out of the purview.

BAYLEY, J. To entitle a devisee to specific property, it is incumbent upon him to show that there are, in the will, words sufficiently large to pass that property. When that is the case the property will pass, unless a contrary intention appears from other parts of the will. The onus is, in the first instance, on the devisee, but when he has made out that the words are sufficiently large to pass the property, the onus is shifted, and cast on the opposite party. In this case, the testator devises all the freehold and copyhold lands of which he was in the immediate possession. At the time of making his will, he was in the immediate possession of certain lands, of which he was seized in fee simple, and of certain other lands, of which he was seized for life, with reversion to himself in fee, expectant on his mother's death; he has therefore used words sufficiently large to include the property in question, unless it can be collected from other parts of the will, that he intended that the property should not pass; and it has been contended that it cannot pass, upon two grounds, first, because the will would then be inoperative as to the settled property, because he gives the property to his wife for life, with remainder to his daughter in fee, and, independently of the will, the wife had, in the settled property, an estate for life, and the daughter an estate in tail; and in case of no other issue, that she would take the reversion in fee by descent. There are many instances, however, in which a testator has devised settled property to a person entitled to take under the settlement, and no case has been cited in which that circumstance has been held to prevent the devise taking effect, where the words are sufficiently large to comprehend the property; and there being no authority upon the subject, I think we ought not so to hold in this case. Then, as to the residuary clause, it seems to me, that the testator did not in that clause contemplate the property in question. He uses general words for the purpose of passing all his property. In the early part of the will, he describes specifically a reversionary interest which he had expectant on the death of his mother, and if he had intended by the residuary clause to pass specific property, I think he would have used a specific description of

it. The use of the general words in the residuary clause does not satisfy my mind that the testator then had in contemplation the property in question. If there had been no residuary clause, the property in question undoubtedly would have passed by the particular clause; and I know of no instance in which the general words of a residuary clause have been held to control and limit the operation of a preceding particular devise. As to the other question, I have no doubt whatever. The enacting part of the statute contains large and general words, but the recital refers to the particular inconvenience intended to be remedied. That inconvenience was, that a will expressly devising copyholds was inoperative, where the testator had omitted to make a surrender to the uses of his will. The surrender in such a case was a mere matter of form, and I am of opinion that the statute meant to supply the want of a surrender in such cases only, and not where it was a matter of substance. Here the surrender, coupled with the separate examination of his wife, is a matter of substance. I am quite satisfied, that the legislature did not mean to take away that protection which such a surrender is calculated to afford to *feme coverts*. It is the duty of the stewards of the manors in such cases to take care that no *feme covert* is suffered to surrender an estate to the uses of a will, without previously apprizing them of the consequences of that act. For these reasons, I am of opinion that the lessor of the plaintiff is entitled to recover both the freehold and copyhold land.

HOLROYD, J. It appears to me that the testator in this devise had in contemplation, not only lands of which he was in possession, but likewise lands of which he was not in possession; and he there makes use of the words applicable to both. The lands of which he was not in immediate possession were one acre, (with respect to which there is no question,) and six acres and a half of freehold, of which he was seized for life, with remainder to his wife for life, with remainder in special tail, and the reversion in fee to himself. He had, besides, land of which he was not in the immediate possession, namely, that which was to come to him after the death of his mother; and, having these in his consideration, he gives all the lands of which he was in the immediate possession, and also the land expectant on her death, to his wife for life, with remainder to his daughter Mary Nethercote, her heirs and assigns, for ever. Now, the words are sufficiently large to comprehend both. I apprehend it to be a clear principle of law, that where words are unequivocal, and clearly comprehend a particular species of property, they are not to be narrowed and restrained by mere conjecture. I am therefore of opinion, that the six acres and a half are included in the devise of lands of which he was in the immediate possession. With respect to the other point, it seems to me clear that the statute only meant to do away with the necessity of making a surrender, which was mere matter of form. Assuming the words of the enacting part of the statute to be sufficiently large to comprehend a case of this kind, they must still be construed with reference to the mischief intended to be guarded against. That mischief was the necessity of making a mere formal surrender. Now, if before the statute,

the steward had taken a formal surrender without examining the wife apart from her husband, nothing would have passed under the will. I am of opinion that the statute merely supplies the surrender, and not that examination of the wife which, by the custom of this manor, was necessary previously to the passing of the surrender. I am quite satisfied, that the legislature did not intend to deprive married women of that substantial protection which, by the custom of this and other manors, is extended to them in cases of copyhold, and which is analogous to the protection allowed them by the law of England in cases of freehold property. For these reasons, I am of opinion, that the lessor of the plaintiff is entitled to the judgment of the Court.

BEST, J., concurred.

Judgment for the plaintiff.

MARSH, Executor of QUINLAN, v. C. M. BULTEEL.

p. 507.

Declaration stated that defendant covenanted to obey, abide by, and perform an award, and that he would not prevent the arbitrators from making their award. It then stated that the arbitrators made their award, and thereby directed the defendant to pay a certain sum therein mentioned; and alleged as a breach of the covenant, that the defendant did not pay the sum awarded. Plea, that before the award, defendant, by deed, revoked the authority of the arbitrators, of which revocation they had notice: *Held*, upon demurrer, that defendant was entitled to judgment, although it appeared by the plea, that he had been guilty of a breach of the covenant to abide by the award by revoking the authority of the arbitrators, the plaintiff being entitled to recover damages only in respect of the cause of action stated in his declaration, and not in respect of a cause of action disclosed in the plea.

The second count of the declaration stated the deed of reference, and then averred that defendant did, before the making of the award, hinder and prevent the arbitrators from making their award in this, that the defendant, by a certain deed in writing, signed and sealed by him, after reciting, as was therein recited, did revoke the authority: *Held*, upon demurrer, that this was an allegation, not of the mere legal effect of the deed, but of the effect of revocation, and that it was unnecessary to state that the arbitrators had notice of the revocation, that being necessarily implied in the averment, that the defendant had revoked the authority.

COVENANT upon a deed, whereby the parties agreed to submit certain differences to the award of arbitrators. The first count of the declaration stated the defendant's covenant to obey, abide by, and perform the award, and that he would not by affected delay or otherwise, hinder or prevent the arbitrators from making their award. It then stated, that the arbitrators duly made their award, and that they thereby directed, that the defendant should pay to the plaintiff certain sums therein mentioned. The breaches assigned were, that the defendant did not pay those sums of money. The second count was founded upon the same deed, and assigned as a breach, that the defendant did, before the making of the award, hinder and prevent the arbitrators from making their award in this, that the defendant, by a certain deed in writing, signed and sealed with the seal of the defendant, after reciting as therein was recited, did revoke, abrogate, and put an end to, and determine all and every arbitration or arbitrations, reference or

references to arbitration, deed or deeds of submission, agreement or agreements, contract or contracts to refer to the arbitration or award of the said arbitrators, whereby they, the said arbitrators, were hindered and prevented from making their said award, and whereby the said plaintiff lost, and was deprived of the benefit that he would otherwise have derived from an award. The defendant pleaded to the first count, that before the arbitrators made their award, he, the defendant, by deed, revoked their authority, of which deed and revocation of their authority, the arbitrators before the making of the award in the first count mentioned, had notice. To this plea the plaintiff demurred. The defendant demurred to the second count of the declaration, and assigned for cause, that it was not alleged, that the arbitrators had notice of the revocation, nor was it shown how the defendant hindered them from making their award.

Chitty, for the plaintiff. The plaintiff is entitled to judgment on the demurrer to the plea to the first count. The ground of action stated in that count, is the breach of the covenant to perform the award. The plea shows the award to be void, but admits that the defendant has committed a breach of another covenant set out in the declaration, by which the parties covenanted not to prevent the arbitrators from making their award. In *Charnley v. Winstanley*, 5 East, 266, this Court refused to arrest the judgment in an action brought upon an arbitration deed, where one of the parties to the submission had become a feme covert subsequently to the submission and before the award: the breach alleged in the declaration, being non-payment of money pursuant to the award, on the ground that it appeared upon the whole record, that one of the parties had been guilty of a breach of the covenant, not to abide by the award, *Le Bret v. Papillon*, 4 East, 502. Now, here it appears by the defendant's plea, that he has broken that covenant by revoking the arbitrators' authority, and therefore that case is expressly in point. Secondly, the plaintiff is entitled to judgment on the last count. For there an actual revocation of the authority of the arbitrators is alleged, and that is sufficient. In *Vynior's case*, 8 Co. 162, which was an action on a bond, the defendant craved oyer of the condition, which was to abide the award of Mr. Rugge, and then pleaded, that he by his deed "revoked, and abrogated the authority of the arbitrator," to which the plaintiff demurred, and it was resolved, that the plaintiff need not aver, that the arbitrator had notice of the countermand, for that is implied in these words, "revocavit et abrogavit omnem auctoritatem," for without notice there is no revocation or abrogation of the authority, therefore, if there was no notice, it should be found for the defendant, as if a man pleads quod feoffavit, dedit, et dimisit pro termino vitæ, it implies livery, for without livery, it is no feoffment gift or demise. Now, that is an authority, expressly in point to show that the last count is properly framed.

Gaselee, contra. The plea is a good answer to the cause of action alleged in the first count, which is substantially the non-payment of the money awarded. The plea shows that the award is wholly void. If the argument on the part of the plaintiff is to prevail, he will derive

the same advantage from this action as if the award had been good. At any rate, that would be the case, if the plaintiff had declared in debt upon the award, for in that case he would have been entitled to recover the whole sum awarded. (The Court then desired him to proceed to the other point.) The plaintiff ought to have stated in the last count that the arbitrators had notice of the deed of revocation. The allegation is, that the defendant, by a deed signed and sealed by him, reciting as therein was recited, did revoke. The plea, therefore, merely states the legal effect of the deed. Now the mere execution of such a deed, which purports to revoke the authority of the arbitrators, would not operate as a revocation without express notice, and therefore the second count is bad.

ABBOTT, C. J. I am of opinion, that the defendant is entitled to judgment upon the demurrer to the plea to the first count of the declaration. The ground of complaint in that count is the non-payment of money pursuant to the award, or in other words, a breach of the covenant to perform the award when made. It appears by the plea, that the defendant, by countermanding the authority of the arbitrators, has broken the covenant to abide by the award, or that whereby he stipulated not to hinder the arbitrators from making an award; and it is urged on the part of the plaintiff, that although this plea is an answer to the cause of action suggested in this count, yet that, inasmuch as it appears upon the whole record that the defendant has been guilty of a breach of covenant, the plaintiff is entitled to judgment upon that count, and the case of *Carnley v. Winstanley*, 5 East, 266, has been relied upon. That case, however, is very distinguishable from the present. There it appeared upon the face of the plaintiff's count, that the award was made after one of the parties to the submission had become a feme covert. Her marriage was in itself a revocation of the authority of the arbitrators, and therefore was a breach of the covenant to abide by the award. In this case, the breach of that covenant is disclosed only by the defendant's plea, and it never has been held, that a plaintiff who seeks to recover damages for one ground of action stated in his count, is entitled to recover in respect of another disclosed by the defendant's plea. I am of opinion, that a plaintiff can recover only in respect of the ground of action stated in his declaration. As to the demurrer to the last count, I cannot distinguish this from *Vynior's* case. There the allegation was, that the party by his deed revoked the authority of the arbitrator, and the decision was, that that allegation imported notice to have been given to the arbitrator, and that being so, the case is expressly in point with the present. If the declaration in this case had alleged, that the party had sealed and delivered a certain deed, containing therein as follows, and setting out the deed, and thereby revoked the authority of the arbitrators, it would not have been sufficient, for that would only have been an allegation of the effect of the deed. Here the allegation is, that there was an express revocation by deed.

BAYLEY, J. It is laid down by Lord Coke in *Vynior's* case, that there is a difference when two things are requisite to the performance

of an act, and both things are to be done by one and the same party, as in the case of feoffment, gift, demise, revocation, &c., and when two things are requisite to be performed by several persons, as in the case of a grant of a reversion; attornment is not implied in it; and yet without attornment the grant hath not perfection; but, forasmuch as the grant is made by one, and the attornment is to be made by another, it is not implied in the pleading of the grant of one; but, in the other case, both things are to be done by one and the same person, and that makes the difference." Now, here the allegation is, that the defendant by deed revoked the authority, and that is a double allegation, importing, first, that the party executed a deed of revocation, and second, that he gave notice to the arbitrators. The plaintiff, therefore, may put in issue, either the execution of the deed, or the fact of notice. I think, therefore, that *Vynior's* case is an express authority to show that the last count of the declaration is properly framed, and for the reasons given by my Lord Chief Justice, I am also of opinion, that the defendant is entitled to judgment on the demurrer to the plea to the first count.

HOLROYD, J. I am of opinion that the defendant is entitled to judgment upon the demurrer to the first plea. This case is very distinguishable from *Charnley v. Winstanley* for the reasons already given by my Lord Chief Justice; and I think that the plaintiff, who by his declaration, seeks to recover damages for the causes of action therein stated, ought not to be allowed to recover in respect of another cause of action, disclosed by the defendant's plea. As to the demurrer to the last count, *Vynior's* case is an authority to show that it is sufficient to allege that the party by deed revoked the authority without expressly averring that notice of revocation was given to the arbitrators, and that being so, the judgment must be for the plaintiff upon that count.

Judgment for the defendant upon the demurrer to the plea to the first count, and judgment for the plaintiff upon the demurrer to the last count.*

* Best, J., was absent at Chambers.

DRONEFIELD v. ARCHER.—p. 513.

Where, in the account between plaintiff and defendant, there are items clearly due on both sides, it is an arrest without reasonable and probable cause within 43 G. 3, c. 46, s. 3, if the plaintiff arrests and holds the defendant to bail for the amount due to him, without at the same time, giving him credit for the items clearly due on the other side of the account. He ought only to hold the defendant to bail for the admitted balance.

Tindal, in Michaelmas term last, obtained a rule nisi for taxing the defendant's costs under 43 G. 3, c. 46, s. 3, the plaintiff having held the defendant to bail without any reasonable or probable cause. It appeared upon the affidavits, that the plaintiff, in September, 1817, en

tered into the defendant's service under a verbal contract, under which he claimed as due from the defendant, a sum of 23*l.* and upwards. Against this demand, however, the defendant had a set-off, which was proved. And it further appeared, that on the 8th July, 1820, when a tender of 2*l.* 19*s.* 8*d.*, as the balance due was made, the plaintiff refused to receive it, claiming as the balance then due to him, the sum of 6*l.* 19*s.* 8*d.*, only. The jury were of opinion at the trial, that this was the true balance, and thereupon found a verdict for the plaintiff, damages 4*l.* in addition to the sum tendered. On the 10th July, the defendant was held to bail in the sum of 15*l.* and upwards.

D. F. Jones showed cause, and contended that here there was a reasonable and probable cause for the arrest, the amount due from the defendant being upwards of 15*l.* As to the set-off, it was not material, because the statutes of set-off are not compulsory, and the plaintiff could not be certain whether the defendant would set off the debt due to him. In *Brown v. Pigeon*, 2 Campb. 594, it was held, that where a party who owed another 23*l.*, and had a debt of 10*l.* due to him, arrested the other party for 10*l.*, although upon the balance no debt whatever was due to him, no action could be maintained for a malicious arrest.

Tindal, contra, was stopped by the Court.

Per Curiam. It is an arrest without reasonable or probable cause, if, where the plaintiff knows that the defendant has a set-off reducing the balance below 15*l.*, he holds the defendant, nevertheless, to bail for the whole amount. The effect of the statute of set-off is to make the balance really due the debt for which the arrest ought to be made. The stat. 43 G. 3, c. 46, s. 3, directs that if a plaintiff holds the defendant to bail in any amount, without reasonable or probable cause for so holding him to bail, he shall pay costs. Now, what is a reasonable and probable cause for arrest? Is it not the obtaining security for that which is fairly due? Now that must be the balance. It is said, that a defendant is not bound to set-off the debt due to him. That is a very good reason why the plaintiff should be allowed to include in his declaration the whole sum due to him, but it is no ground for contending that a party should thus be deprived of his liberty. Suppose a plaintiff has made advances to a merchant to the amount of 100,000*l.*, the true balance being, after allowing the defendant's set-off, only a small sum, can it be contended that he may be held to bail to the full amount of the advances made? If so, it might be impossible for him to obtain bail; and he might, by lying in prison, commit an act of bankruptcy. In this case the plaintiff, when the tender was made to him, admitted the balance to be under 7*l.*, and yet, notwithstanding, two days after that, he caused the defendant to be held to bail for 15*l.* and upwards. He had, therefore, no reasonable or probable cause for holding him to bail in that amount. The rule must be made absolute.

Rule absolute.*

* In *Feeley v. Reed*, on a later day in the term, a question arose, whether executors, having held a party to bail without reasonable or probable cause, for a debt due to their testator, were within the act. And the court held that they were, because an action for a malicious arrest would lie against them, and this was an analogous remedy.

COBB, Assignee of MONSEY, a Bankrupt, v. SYMONDS and Another.—p. 516.

A smuggler may be a trader within 1 Jac. 1, c. 15, s. 2, as being a person who seeks his trade of living by buying and selling, although such buying and selling be illegal. A penalty due to the crown is a debt within 21 Jac. 1, c. 19, s. 2, and, therefore, where a trader lay in prison above two months, being unable to pay exchequer penalties for smuggling: *Held*, that it was an act of bankruptcy.

TROVER for cattle, goods, and chattels, the property of the bankrupt before his bankruptcy. Plea, general issue. At the trial before DALLAS, C. J., at the last Summer assizes for the county of Norfolk, the principal questions were, as to the trading and act of bankruptcy. As to the first, the only instances of buying and selling which were proved, were the purchase of large quantities of smuggled goods, and the sale of those articles by retail. No act of buying and selling legal goods was given in evidence. The act of bankruptcy consisted in lying in prison above two months at the suit of the crown, for penalties incurred by him in consequence of his smuggling transactions. The Lord Chief Justice thought, that as to the first, the case fell within *Ex parte Meymott*, 1 Atk. 197, and that as to the second, the penalty might properly be considered as a debt, and so the act of bankruptcy was sufficient. The plaintiff accordingly had a verdict. *Frere*, Serjt., in last Michaelmas term obtained a rule nisi for entering a nonsuit. And now,

Blossett, Serjt., *Storks* and *Rolfe*, showed cause. In this case there was a sufficient trading, unless the illegality of it makes the difference. The statutes relating to bankruptcy, speak of the bankrupt as an offender, and the preamble to 1 Jac. 1, c. 15, speaks of such as wilfully and wickedly become bankrupts. And it would surely be absurd to argue, that an additional offence, by which he is more wickedly and wilfully a bankrupt, could prevent him from having a commission taken out against him. Suppose a person trades without having served an apprenticeship, could it be contended that this would prevent him from being a bankrupt? Here, he seeks his living by buying and selling, and the very circumstance that his trade is illegal, puts his estate in greater danger, and requires that his real creditors, whose debts are unaffected by the illegal transactions, should have this protection. The only effect of the smuggling transactions would be to prevent the debts tainted with it from being received or proved under the commission. The object of the bankrupt laws was to protect the meritorious creditors, and prevent them from being placed in jeopardy by the improper speculations of their debtor. The case *Ex parte Meymott* is an express authority in point, and has been uniformly acted upon. In 1806, Johnson the smuggler was made a bankrupt, and this point was never taken as an objection to the commission. As to the act of bankruptcy, it is clear, a penalty is a debt due to the crown, and the 21 Jac. 1, c. 19, s. 2, which makes the lying in prison two months an act of bankruptcy, is quite general. This is clearly as much within the mischief to be remedied as any ordinary debt.

Scarlett, *Frere*, Serjt., and *Robinson*, contra. Nothing can be done

under such a commission as this. For all the transactions in which the bankrupt was engaged, were illegal, and so the debts due to him under this illegal trading could not be assigned. It does not appear that Johnson's case was contested. In *Ex parte Meymott*, this was not the point decided, but merely an obiter dictum of Lord HARDWICKE. An infant cannot be made a bankrupt, *Rex v. Cole*, 1 Lord Raym. 444, and the reason given is, because he cannot contract debts. Here, the debts contracted are not recoverable, being tainted with smuggling. As to getting his living by buying and selling, that must surely mean by a legal buying and selling. Why should an individual like this have the benefit of a certificate to protect himself from any future demands? Suppose the case of a receiver of stolen goods, who equally gets his living by buying and selling them; could he be made a bankrupt as a trader? No person could, under the circumstances of this case, have given credit to him as a trader. As to the second point, the statute only speaks of arrest for a debt, and says nothing of penalties due for offences committed. A lying in prison for a misdemeanor is not within it, and this is of the same nature.

ABBOTT, C. J. The words of the statute 1 Jac. 1, c. 15, s. 2, are, that all persons seeking their trade of living by buying and selling, may be made bankrupts; and I think the safest course for us to pursue, will be to give effect to the plain meaning of these words. I can find nothing to satisfy me, that the legislature did not intend to include in them every species of buying and selling, whether legal or illegal. If therefore the point was entirely new, I should be of opinion, that this was a sufficient trading within the statute. But fortified as I am by the opinion of that very eminent lawyer, Lord HARDWICKE, I entertain no doubt on the subject. It is very true, that this was not the point decided in *Ex parte Meymott*, 1 Atk. 197, but Lord HARDWICKE there assumes it as a proposition incapable of being denied, and builds his argument upon it. On the other point, I am clearly of opinion, that a penalty due to the crown is a debt within 21 Jac. 1, c. 19, s. 2, and that the lying two months in prison under it in the present case, was a sufficient act of bankruptcy. The rule must therefore be discharged.

HOLROYD, J.* I am of the same opinion. As to the act of bankruptcy, it is clearly within the statute, for it is equally a proof of a party's insolvency, whether he lie in prison because he is unable to pay a penalty or a debt. As to the question whether this was a sufficient trading, I am of opinion, both on the words of the statute, the authority of Lord HARDWICKE, and the principle of the thing, that we ought to decide that the illegality of it can make no difference. The words of the statute are general; "persons seeking their trade of living by buying and selling." Now in this case the party did so; and he therefore falls within the words. But it is said that it must be a lawful buying and selling. The statute, however, is entirely silent upon that subject, and it would be very strang, if a party could set up his own illegality, to prevent himself from being made a bankrupt. Lord HARDWICKE, in *Ex parte Meymott*, puts this case as one without doubt, and appears to refer to it as if

* Bayley, J., in the Bail Court.

there had been a case decided upon the point. As to the principle, it seems to me that traders are liable to greater losses, when the trade which they carry on is unlawful, and persons advancing them money are subjected thereby to greater risk. Then if so, the summary jurisdiction of a commission of bankruptcy is peculiarly advantageous in such cases. Upon principle, therefore, it seems to me, this would fall within the mischief intended to be remedied by the statutes against bankrupts. But if that were uncertain, it seems to me that it is quite sufficient that it falls within the words of the clause in 1 Jac. 1, c. 15. Upon both points, therefore, I agree with the opinion which my Lord C. J. has pronounced.

BEST, J. A man who owes a penalty is a debtor to the king, and I am therefore clearly of opinion, that there was a sufficient act of bankruptcy in this case. As to the other point, the opinion given by Lord HARDWICKE, in *Ex parte Meymott*, is decisive, and that opinion has been acted on ever since. The original statutes of bankruptcy treat the bankrupt as a criminal, and were intended to give prompt execution against him; and till more modern times, they never contemplated any protection to him. It seems to me, therefore, that a party who actually gains his living by buying and selling cannot be allowed to say, that because that buying and selling was illegal, he is not to be made a bankrupt. This rule must therefore be discharged.

Rule discharged.

DAWSON v. LINTON, Esquire.—p. 521.

Where, by a local act, it was provided that a drainage tax should be paid by the tenants of the lands and grounds charged with the same, who might deduct and retain the same out of the rents payable to their landlord. And also, that in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrear, and if the same should be untenanted, or not sufficient distress could be found, the lands and grounds chargeable should remain as a surety for the payment thereof, and might be taken possession of, and let in discharge of the tax: Held, that the tenants to be charged with the tax were those in whose time the tax accrued due, and not the tenants for the time being. And, therefore, where an outgoing tenant having paid his rent in full, had left property on the premises, which was afterwards distrained for the tax due during his tenancy, and he was obliged to pay it: Held, that he might recover the same in an action against his landlord for money paid.

ASSUMPSIT upon several special counts, and also for money paid to the use of the defendant. Plea, general issue. At the trial, before RICHARDSON, J., at the last Lincoln assizes, the only question was, as to the liability of the defendant to repay to the plaintiff the sum of 20l. 14s. for a drainage tax. It appeared that the plaintiff had been tenant to the defendant of a farm, situate within a certain district, liable to a drainage tax of 1s. per acre. He paid his rent in full to the defendant, and quitted the farm, on the 6th April, 1820, but did not pay the drainage tax then due. When he quitted, by the permission of the incoming tenant, he left a stack of wheat on the premises. A

demand being in July 1820 made on the incoming tenant by the collector for the year's drainage tax, due April 6th, 1820, the tenant refused to pay it, and a warrant of distress having been obtained, the plaintiff's stack of wheat was distrained, and in consequence, the plaintiff was obliged to pay the amount of the tax. By the local act it was provided, that the tax should be paid by the tenants of the lands and grounds charged with the same respectively; and that such tenants should and might deduct and retain the same out of the rents payable to their landlord; and also, that in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrear; and if the same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a surety for the payment thereof, and might be taken possession of, and let in discharge of the tax. It was contended, at the trial, that the succeeding tenant was liable for the tax, and therefore that the action should have been against him. The plaintiff had a verdict. *Reader*, in last Michaelmas term, obtained a rule nisi for entering a nonsuit. And now

Balguay, who showed cause, was stopped by the Court, who called on *Clarke* and *Reader* to support the rule. The act of parliament directs the tax to be paid by the tenant of the land charged; now that must mean, not the tenant in whose time the tax accrued, but the tenant for the time being; and it is confirmed by the subsequent provision, making the land itself liable if untenanted. Then if so, the incoming tenant should have paid it, and might have deducted it from the next rent. It was his default, therefore, which caused the distress to be taken of the wheat; and consequently the action should have been brought against him. If this were not so, the tenant, by having on the farm the goods of various persons, all of which might be distrained for the tax, might subject the landlord to a variety of actions.

ABBOTT, C. J. It is clear that this tax must ultimately fall on the landlord, and that the plaintiff has paid his money in discharge of it; he has therefore a right to call upon the landlord to repay it to him. I think the meaning of the act was to make the tax payable by the tenant in whose time it became due, and who received the benefit of the drainage. If it had then been paid, the plaintiff might have deducted it from his rent; but as he was not called on to pay it till after the rent had been paid, I think he has now the right to require the landlord to reimburse him. It might be very hard, if the new tenant were to be compelled to advance money to pay the tax for his predecessor, even though ultimately he would be entitled to recover it. Here, the action is only for money paid for the defendant, and not for any special damage arising from the distress. The verdict is therefore right.

Rule discharged.

DOE, on the Demise of SUTTON, v. RIDGWAY.—p. 523.

Where a rule has been obtained for staying the proceedings in ejectment till the costs of a former ejectment have been paid, the Court will not interfere, and permit the defendant, in case those costs are not paid before a certain day, to be named by the Court, to non pros the ejectment pending.

Gaselee, applied for a rule calling upon the lessor of the plaintiff to show cause why in default of payment of the costs of a former ejectment between these parties within a certain time to be named by the Court, the defendant should not be at liberty to non pros the present ejectment. It appeared on the affidavits, that Anne Walker, the person last seized, died October 14th, 1801, and that the lessor of the plaintiff filed his bill in equity to recover the premises in 1819, which bill was, on demurrer, dismissed. In Trinity term, 1819, he brought an ejectment, and on the trial, at the Summer assizes of that year, was nonsuited. In Hilary term, 1820, a second ejectment was brought, and at the trial, at the subsequent Lent assizes, the defendant had a verdict. On the 13th October, 1821, a fresh declaration in ejectment was delivered, and in Michaelmas term last, a rule was obtained, and made absolute, for staying the proceedings until the costs of the former ejectment were paid. These costs had been taxed and were still unpaid. It was admitted that there was not any precedent for such a motion.

Per Curiam. There is no precedent for such a motion as this; and the effect of it would be this, that if the party could not pay the costs within the time limited, he would be altogether deprived of his remedy by ejectment, the twenty years having now expired. We think we ought not to go further than the precedents have already gone in these cases.

Rule refused.

The KING v. the Inhabitants of WILMINGTON.—p. 525.

During the minority of a child, there can be no emancipation unless he marries, and so becomes himself the head of a family, or contract some other relation, so as wholly and permanently to exclude the parental control. Semble, that the acquiring a settlement of his own does not properly constitute an emancipation.

Two justices by their order removed John Moore, his wife and family, from the parish of Crayford to the parish of Wilmington, in the county of Kent. The sessions on appeal confirmed the order, subject to the opinion of this Court on the following case.

The pauper, John Moore, never did any act by which he acquired a settlement in his own right. In the year 1814, he was removed with his father, Thomas Moore, by an order of two justices, from the parish of Crayford to the parish of Wilmington, as the place of settlement of the pauper's father, which order was appealed against, and upon the hearing of the appeal confirmed. The pauper, in the same year, re-

turned with his father into the parish of Crayford, and was hired by the week to Sir Henry Crewe, in that parish, in whose service he continued as a weekly servant for nearly two years. Upon leaving the service of Sir Henry Crewe, he followed the occupation of mole-catching in the parish of Crayford, by which he obtained his own living. He never resided with his father's family, nor did his father exercise any control over him. In the latter end of the year 1815, when the pauper was about 17, his father left Crayford, and went to live first at Poplar, in a tenement at 4s. per week, where he continued about eight months, and in or about the month of February, 1817, went to Bow, where he rented a house and orchard at 20l. per annum, and in which he still continues to reside. Whilst the pauper followed the business of mole-catching at Crayford, he used occasionally to visit his father both at Poplar and at Bow, and once slept at the father's house in Poplar, but he did not receive any maintenance or assistance whatsoever from his father. After the father had occupied the house at Bow for rather more than a year, the pauper, who was then about 19 years of age, married his present wife. The question for the opinion of the Court was, whether the pauper before his marriage was emancipated by his earning his own livelihood, in the manner before mentioned, in the parish of Crayford.

Bolland, in support of the order of sessions, contended, that the pauper was emancipated at the time when the father gained his settlement at Bow. And he relied on the case of *Eastwoodhey v. Westwoodhey*, 1 Str. 438, and Lord KENYON's judgment in *Rex v. Offchurch*, 3 T. R. 114, and *Rex v. Walpole St. Peter's*, Burr. S. C. 638.

Berens, contra, was stopped by the Court.

ABBOTT, C. J. It is of importance to lay down so general rule for the guidance of magistrates on this subject of emancipation, and the best which I can suggest is this, that during the minority of a child there can be no emancipation, unless he marries, and so becomes himself the head of a family, or contracts some other relation, so as wholly and permanently to exclude the parental control. I say nothing about his acquiring a settlement of his own, because that does not, as it seems to me, properly fall under this head. There can be, however, no question, that in that case he is only removable to his own acquired settlement. Here, the pauper was under 21, and had neither married nor contracted any such relation as I have described, at the time when his father acquired the settlement at Bow. He was therefore not emancipated, and the order of sessions is wrong.

Order of sessions quashed.*

* See *Rex v. Witten cum Twambrooks*, 8 T. R. 355.

The KING v. RIDGWAY.—p. 527.

Where the sessions, without hearing the merits, quashed a conviction under 39 & 40 G. 3, c. 106, s. 1, for a defect in form, the Court of King's Bench will, upon a removal of the order by certiorari, quash the order of sessions, if they are of opinion that there is no defect in form, and send the case back to be heard upon the merits. It was stated in such conviction that defendants had attended a meeting for carrying on a combination of journeymen, for the purpose of obtaining an advance of wages: Held, that this expression was synonymous with the words of the act, which prohibits combinations to obtain an advance of wages, and that the conviction was sufficient.

THIS was an appeal to the quarter sessions of the peace for the county of Lancaster, against the following conviction, for an offence under the statute 39 and 40 G. 3, c. 106, s. 4. Lancaster, to wit. Be it remembered, that on the 19th day of March, 1821, T. H., &c., are convicted before us, R. P. and S. W., Esquires, two of his majesty's justices of the peace for the county of Lancaster, of having, on the 10th of March, in the year aforesaid, and within the space of three calendar months next before this present 19th day of March, in the year aforesaid, at Great Bolton, in the county of Lancaster, attended a meeting of journeymen and workmen, then and there had and held, for the purpose of maintaining, supporting, continuing, and carrying on a combination, for a purpose, by the statute in such case made and provided, and hereinafter next mentioned, declared to be illegal, to wit. A combination of journeymen and workmen in the business of bleaching, for the purpose of obtaining an advance of wages in that business, contrary to the statute made in the 39th and 40th years of the reign of his late majesty, King George the Third, intituled, &c. When the appeal came on to be heard, several objections were taken by the counsel for the appellants to the form of the conviction. And the Sessions, without hearing any evidence on the merits, made an order for quashing the conviction, subject to the opinion of this Court as to its sufficiency in point of form.

J. Williams and *Denman*, in support of the order of sessions. Even supposing the sessions wrong, there is no precedent which can be found, where this Court have ever interfered after the sessions have quashed a conviction. This is like moving for a new trial after an acquittal for a misdemeanour, owing to a misdirection on the part of the Judge, which is never allowed. The cases in which this has been done before, are *Rex v. Allen*, 15 East, 345, *Rex v. Cook*, 3 T. R. 519, and *Rex v. Redfearne*, 4 T. R. 273. But all those cases were reserved on facts, and in the two latter, the convictions had been affirmed by the sessions. Here too the act on which this conviction proceeds, has fixed a limited time within which the charge must be preferred, which affords an additional argument against reserving a case on a mere point of form, and after long delay in the court above, again trying the merits at the sessions. But supposing this not to be well founded as a preliminary objection, then the conviction is defective in form. It only states, that the parties convicted, attended a meeting for the purpose of maintaining, supporting, continuing, and carrying on a combination

for a purpose by the statute declared to be illegal, viz. a combination for the purpose of obtaining an advance of wages. Now this does not follow the words of the act 39 and 40 G. 3, c. 106, the third section of which, in describing the combinations thereby made illegal, calls them combinations to obtain an advance of wages. Now, a combination for the purpose of obtaining, is not necessarily a combination to obtain. For the former would include combinations for an idle, foolish, and irrelevant purpose, but the latter could only mean such as are likely or calculated to obtain the end. And this was the opinion of Lord ELLENBOROUGH in *Rex v. Nield and Others*, 6 East, 426, where he says, "It is not enough that the agreement should be for the purpose of controlling, that is, with intent to control, but it must be entered into for controlling, that is, for effecting that object." That is precisely in point with the present case. The safest way in these cases is to follow exactly the words of the statute.

Scarlett, *Coltman*, and *Starkie*, contra, were stopped by the Court.

ABBOTT, C. J. I am of opinion, that in this case the order of sessions is wrong and must be quashed. This order is brought before us by certiorari, and that being so, we find that the original conviction has been quashed by the sessions for informality. It is then our duty to examine it, and if we cannot see any informality in it, to quash the order of sessions. But in so doing, we ought not to deprive the party of his appeal on the merits, and therefore, we shall, after quashing the order of sessions, send the case back to them to enter continuances and hear the appeal. Then is there any informality? No man entertains greater respect for the opinion of Lord ELLENBOROUGH than I do, but I own that the observation quoted from *Rex v. Nield and Others* is not satisfactory to my mind. He seems to have considered the word "purpose" as synonymous with the word "intent," and to have thought that an agreement with intent to control might not be an agreement to control. But looking at this act of parliament, I am of opinion that a combination for the purpose of obtaining, and a combination to obtain an advance of wages, are the same. The third section expressly prohibits combinations to obtain an advance of wages, or to lessen the time of work, or to decrease the quantity, or for any other purpose contrary to the act. That shows, that the legislature in using the word "purpose" in this act, meant it to be synonymous not with "intent," but with "object." The same observation is deducible from the words of the fourth section. I think, therefore, that there is no difference in the sense of the words used in this conviction and the words of the act of parliament, and if so, the conviction is sufficient.

BAYLEY, J. I am of the same opinion. The very words of the statute need not be used in the conviction, it is sufficient if the words used are equivalent with the words of the act. Now, here the words "for the purpose of obtaining," and "to obtain," are, looking at this act of parliament, clearly synonymous. As to the other question, I entertain no doubt. The sessions have quashed the conviction for want of form, and upon its being brought before us, no want of form appears.

Their order is therefore wrong, but I agree that the case should be remitted to them, that they may now hear it on the merits.

BEST, J.,* concurred.

Order of sessions quashed, and case sent back to the sessions to enter continuances and hear the appeal on the merits.

* Holroyd, J., had left the Court.

The KING v. the Mayor, &c., of GREAT YARMOUTH.—p. 531.

Where, in a case in which a corporation were defendants, the record is withdrawn, in consequence of the absence of a material witness, who is one of the corporation, and it does not appear that such absence arises from the act of, or is in collusion with the other corporators, the prosecutor will be compelled to pay the costs of not proceeding to trial, pursuant to notice.

Blossett, Serjt., had obtained a rule to show cause why the Master of the Crown Office should not again examine the matter, and tax the defendants their costs in this case, which was a traverse to return to a writ of mandamus, commanding the defendants to admit the prosecutor to his freedom. It appeared that William Barth, one of the common councilmen of the borough, was a material witness on behalf of the prosecutor, and subpœnaed to attend the trial at the last assizes for Norfolk. In consequence of his absence, the record was withdrawn. The Master of the Crown Office certified, that upon reading the affidavits produced before him on both sides, he was of opinion that costs ought not to be paid by the prosecutor, for not proceeding to trial in this case, it appearing, that the not proceeding to trial was occasioned by the absence of one of the witnesses subpœnaed by the prosecutor, which witness was a member of the corporation, and for whose absence there was not any sufficient excuse. It was contended, in support of the rule, that the Master had proceeded upon a wrong principle, inasmuch as the mere circumstance of the witness being a member of the corporation, and being absent without sufficient reason, was not sufficient, unless it appeared also, that in absenting himself, he had acted in collusion with the defendants.

The Court, after hearing *Storks*, who showed the cause, and *Blossett*, Serjt., and *E. Alderson*, in support of the rule, directed that the case should go back to the Master to examine the affidavits again as to the point, whether the absence of the witness was produced by the act of, or in collusion with the other corporators, directing him to award costs, in case he was of opinion that the witness' absence, although without sufficient excuse, arose entirely from his own act.

Rule absolute.

BLUNDELL v. BLUNDELL.—p. 533.

Where an attorney knowing that bail are insufficient, puts them in, and gives notice of justification, he will be personally liable to pay the costs of the opposition.

Andrews had obtained a rule to show cause why the defendant's attorney should not pay to the plaintiff's attorney the costs of the oppositions to bail in this case. It appeared that on the 17th December last, notice was given in the name of the defendant's attorney, that two persons of the names of Miles and Hutchings would justify as bail on the 20th December. At the time when the notice was served, the managing clerk of the defendant's attorney assured the plaintiff's attorney that the bail were both respectable persons, and requested that he would consent to their justification. It turned out, however, upon inquiry, that Hutchings was an insolvent, and upon this being discovered, the bail did not justify. On the 22d December, application was made to add another person as bail, and on the 27th, notice of justification was given for Miles, and one Thomas Moody, whose residence was described No. 5, Waterloo Road, Southwark. On the 31st December, the parties attended at Mr. J. HOLBOYD's chambers, but Moody did not attend. On the 1st January another notice of justification was given for the 2d, and on the 2d January, it appearing that Moody's residence had been misdescribed, being No. 50, Waterloo Road, Southwark, the bail did not justify. Another notice was given for the 4th January, when, upon attending at the Judge's chambers, Miles was rejected as being insufficient. In support of this rule, he cited *Steer v. Smith*, Chitty, 80.

Turton showed cause, upon an affidavit, which stated, that the representation made as to the respectability of the original bail was made by the managing clerk, without the knowledge, privity, or consent of the defendant's attorney, and that the mistake as to Moody's residence was a mere clerical error; and he contended, that there was no reason to make the defendant's attorney pay the costs in this case, it not appearing that he had acted vexatiously in the transaction.

Andrews, in support of his rule, was stopped by the Court.

ABBOTT, C. J. Here there clearly was a misrepresentation as to the respectability of the original bail, by the managing clerk of the defendant's attorney. It is indeed now said, that all this was without the privity or knowledge of the latter, but he does not swear, that, at the time when the bail were put in, he was ignorant of their insufficiency. It was his duty to take care not to put them in as bail, if he knew them to be unfit to justify; and it will be a wholesome lesson to others to make the defendant's attorney, in this case, pay the costs.

Rule absolute, with costs

The KING v. The Justices of COLCHESTER.—p. 535.

It is not necessary in order to give the justices at sessions jurisdiction, to hear an appeal against overseers' accounts, that such accounts should previously have been examined and allowed, pursuant to 60 G. 3, c. 49.

JESSOPP, in last Michaelmas term, had obtained a rule nisi for a mandamus to the justices of Colchester, to enter continuances, and hear an appeal against the overseers' accounts of the parish of St. Botolph, in the borough of Colchester. The accounts in question had, on the 14th May last, been duly allowed by two justices, pursuant to 17 G. 2, c. 38, at a petty sessions; but they had not been examined and allowed at a special sessions, pursuant to 50 G. 3, c. 49. The sessions dismissed the appeal, on the ground that they had no jurisdiction.

Knox and Walford showed cause. The sessions, in this case, had no jurisdiction. In *Rex v. Bartlett*, Str. 983, it was held (before 17 G. 2, c. 38) that the sessions had no jurisdiction until the accounts had been allowed, pursuant to 43 Eliz.; and in *Rex v. Whitear*, 3 Burr. 1365, which occurred after 17 G. 2, the same law was laid down. Now, by the 50 G. 3, c. 49, certain other provisions were made to the mode of allowing overseers' accounts, which, in *Lester's case*, 16 E. 374, were held to be cumulative. Then if so, by parity of reasoning to the cases above cited, these provisions should be complied with before any appeal can be made.

Per Curiam. We are quite satisfied that the sessions had jurisdiction, and that they ought to have heard the appeal. This rule must be absolute.

Rule absolute.

Jessopp and Brodrick were to have supported the rule.

FOXALL v. BANKS and Another.—p. 536.

A certificate to deprive a plaintiff of costs may be endorsed on the postea after costs have been taxed, and although the defendant's attorney was present and did not object to such taxation.

Hutchinson, on a prior day in this term, obtained a rule nisi, calling on the plaintiff's attorney to produce the postea in this case, before Wood, B., in order that he might certify to deprive the plaintiff of his costs. The case, which was an action of trespass, was tried at the last assizes for Surry, before Wood, B., when a verdict was found for the plaintiff, damages one farthing. The Judge, at the trial, intimated his intention of considering whether he should certify or not. It appeared by the affidavit, that the costs had been regularly taxed, and that the taxation had been attended by the clerk of the defendant's attorney, and that no objection was then made. Subsequently to this, a

summons was taken out before Wood, B., to show cause why the postea should not be produced, and a certificate endorsed thereon. This summons was attended by the parties, and the learned Judge then expressed his intention to certify, but the plaintiff's attorney refused to produce the postea for that purpose.

Turton showed cause, and contended, that the application for a certificate came too late, after the costs had been taxed.

Per Curiam. The application was in time, for a certificate may at any time be endorsed on the postea. Let the rule be made absolute, and with costs.

Rule absolute, with costs.

CHAPPELL v. ASHLEY.—p. 537.

When a defendant is in execution for a particular debt under 300*l.*, although the aggregate of the debts for which he is in execution exceeds that sum, he is liable, at the instance of the particular creditor, to be brought up under the compulsory clause in the Lords' act, 33 G. 3, c. 5.

ANDREWS moved for a rule nisi to discharge a rule granted on a former day in this term for compelling the defendant (under the compulsory clause in the Lords' act), to give an account of his estate and effects pursuant to that statute. It appeared that the debt due to the plaintiff amounted to 112*l.*, but that the whole amount of the debts with which he was charged in execution exceeded 300*l.* It was contended that the second and third clauses of the 33 G. 3, c. 5, must be construed together, and that, inasmuch as the defendant could not be entitled to the relief given by the second clause, he ought not to be subjected to the compulsory power in the third.

ABBOTT, C. J. I am of opinion that the defendant is not entitled to this rule. The act of parliament is a remedial one for the benefit of the creditor; and I think that it is competent for any one creditor whose debt does not amount to 300*l.* to avail himself of this clause in the act, and to compel the defendant to assign his property, whatever may be the whole amount of the debts for which the defendant is in execution.

Rule refused.

In the Matter of TAYLOR, Gent., one, &c.—p. 538.

A clerk to an attorney held, during the term for which he was bound, the office of surveyor of taxes under the crown: Held, that he could not, within 22 G. 2, c. 46, s. 8 & 10, be considered as serving his whole time and term in the proper business of an attorney, and that he ought not to be admitted on the roll, and that having been admitted, he ought to be struck off.

E. ALDERSON, in last Michaelmas term, obtained a rule nisi for striking this person off the roll of attorneys of this court, upon the ground that he had not duly served his time as a clerk to an attorney.

It appeared upon the affidavits, that during the whole time for which he was bound, he had been surveyor of taxes for the wapentake of Claro, and the borough and liberty of Ripon, in the county of York; for which purpose he occupied an office, where the business relating to the taxes was conducted. The affidavits in answer admitted this fact, but stated that the business of the office did not occupy more than one-eighth of his time, and that during all the remaining portion, he was employed in learning his profession as an attorney.

Scarlett and *Littledale* showed cause, and contended that this was no more than if the time employed by him as surveyor of taxes had been allowed to him by the consent of his master for the acquisition of any other useful information, or for amusement; and that substantially he had served the full time required by law.

E. Alderson, contra, referred to 22 G. 2, c. 46, s. 8, by which every person who shall be bound to serve any attorney shall, *during the whole time and term of service*, continue and be actually employed by such attorney in the proper business, practice, or employment of an attorney; and by section 10, before he can be admitted, he must make an affidavit that he has actually and really served during the said whole term of five years. Here there were two inconsistent employments, and, therefore, he could not possibly have served the whole time and term.

Per Curiam. It is very important that we should require these provisions to be strictly complied with. Here the party having an employment under the crown during the whole time, could not, with propriety, have made the requisite affidavit. And, therefore, however much we may regret it, we think it our duty to make this rule absolute.
Rule absolute.

REX³ v. the Justices of SURRY.—p. 239.

Where a statute gives an appeal, the appellant giving reasonable notice to the other parties; such notice need not be in writing, but a verbal notice, if reasonable as to time, is sufficient.

Cowley had obtained a rule nisi for a mandamus to the justices of Surry to enter continuances, and hear the appeal of Andrew Barnet against a conviction for gaming under 12 G. 2, c. 28. The defendant was convicted on the 6th November last, and entered into recognizances to appeal against it to the next quarter sessions. It was sworn on the one side, and denied by the other, that at the time of entering into recognizances, his attorney gave a verbal notice to the informer of his intention to appeal. The defendant attended in order to prosecute his appeal at the last January sessions, when, there having been no notice of appeal in writing, the Court refused to hear the appeal. The 5th section of the act giving the appeal states, that "persons aggrieved may appeal, giving reasonable notice to the prosecutor, and entering into recognizances, &c."

Turton showed cause, and contended that the sessions were to judge what was a reasonable notice of appeal, and they were of opinion, that it must be a notice in writing.

Cowley and Adolphus, contra, stopped by the Court.

ABBOTT, C. J. We are of opinion, that where a statute requires reasonable notice to be given, it does not necessarily mean that the notice should be in writing, but only that as to time or number of days it should be reasonable. Here, however, as the fact is disputed, we shall only grant a mandamus to the justices, commanding them to examine whether reasonable verbal notice has been given, and, in that case, to enter continuances, and hear the appeal.

Rule accordingly

JOHNSON v. BIRLEY and Others.—p. 540.

In trespass the Court will, upon a proper case being made for it, require the plaintiff's attorney to give to the defendants information as to the place of abode and occupation of the plaintiff. And where the alleged assault was stated to have taken place at a meeting at which many thousand people were present, and the defendants did not know, and could not find out, after diligent inquiry, who the plaintiff was, the Court thought it a proper case for their requiring such information to be given.

Littledale, on a former day in this term, obtained a rule nisi, calling on the plaintiff's attorney to disclose the place of residence and occupation of the plaintiff to the defendants, and for staying the proceedings in the mean time. It was an action of trespass and assault brought against the Manchester Yeomanry for their conduct on the 16th August, 1819. To this the defendants pleaded several justifications, besides the general issue. The affidavits stated that the defendants and their attorneys had made minute and particular inquiries in Manchester and its neighbourhood to discover who the plaintiff was, without success, and that they had applied for the requisite information to the plaintiff's attorney, who had refused to give it. The meeting at which the assault, if any, took place, was attended by many thousand individuals.

Evans and Bingham showed cause. This is a novel application. The only instances in which it has been granted have been in *qui tam* actions, and in ejectment. Tidd. Pr. 554, and Crompton's Pr. 473, state this hitherto to have been the rule of the Court; and in *Braceby v. Dalton*, 2 Str. 705, the Court expressly so laid it down. As to *Gynne v. Kirby*, 1 Str. 401, it probably was a *qui tam* action, although that does not distinctly so appear; and so must have been *Anonymous*, 2 Barnardiston, 2. As to *Taylor v. Harris*, 4 B. & A. 98, that was the case of a plea in abatement, and does not bear upon this question. Here the existence of the plaintiff is admitted by the plea, and if the object be as to costs, it is now too late to apply for security for costs. The plaintiff may have good reasons for not wishing to disclose his occupation and place of abode, the defendants being powerful, and irritated against him.

Scarlett, Hullock, Serjt., Littledale and Starkie, in support of the rule, were stopped by the Court.

ARBOTT, C. J. It does not clearly appear to me that the case of *Gynn v. Kirby*, was a *qui tam* action; for in *Braceby v. Dalton*, the editor has suggested in a note *quere contra*, 1 Str. 402; so that it is at least doubtful. But, independently of any authority, I am satisfied that the due administration of justice requires that this rule should be made absolute. If it should be followed up by any application for security for costs, that will probably be without success. But there is no reason why the plaintiff should not give this information to the defendants. Unless they have it, they will be under great difficulty in preparing their defence. This alleged assault took place at a meeting of many thousand persons, and the defendants may therefore very probably be altogether ignorant of the plaintiff or his person. The rule generally has been confined to actions of ejectment and *qui tam*, because it is only in such cases that it ordinarily happens that a defendant is totally ignorant of the plaintiff. It is our duty, however, in all cases, to do equal justice, and that requires that this rule should be made absolute.

BAYLEY, J. I am of the same opinion. There is a positive affidavit that the defendants cannot, after diligent search, find out who the plaintiff is, and I think they ought to know that fact; for if they do not, it may be a great obstruction to justice. Previously to the statute of Westminster, a plaintiff appeared in person, unless he had a special writ authorizing him to appear by attorney. Then the pleadings were *ore tenus*, and a defendant had the privilege of seeing and knowing who the plaintiff was. In cases of *qui tam* actions and ejectment, rules of this sort have been before granted, because in those cases, it not unfrequently happens that a defendant does not know who the plaintiff is. It must not be supposed that the authority of *Braceby v. Dalton*, is now unquestioned. Independently of the note to which my Lord C. J. has referred, the practice of the courts has since been materially altered. At that period, the courts invariably refused to require security for costs to be given. The practice now, as to that, is settled to be the other way. I have no doubt, that in the sound exercise of the discretion vested in us, we ought to grant this rule. Here, many thousands were present at the meeting at which the alleged assault took place; and it may make all the difference to the defence to know who the plaintiff is, and thus to ascertain in what part of the crowd he stood. The justification might be very different, whether the plaintiff was actively employed, or only a spectator of the tumult. It is requisite, in order that both parties may have a fair trial, that the information required by this rule should be given.

HOLROYD and BEST, Js., concurred.

Rule absolute.*

* In *Worton and Others v. Smith and Another*, Trin. T. 1821, the Court of Common Pleas granted a similar application in an action on the case for a libel. *Ex relatione Hullock, Serjt.*

DOE, on the Demise of JOHN HURRELL LUSCOMBE, v. YATES,
HAWKER and MUDGE.—544.

Devise of a mansion house and lands to trustees upon trust until John Luscombe Manning should attain the age of 21 years, and then to him for life, he taking and using the testator's surname of Luscombe instead of his own surname, with limitations over to his first and other sons in strict settlement, they severally taking and using the testator's surname instead of their own. There were other limitations over to other persons. The will then contained a proviso, that when any of the premises thereby devised should vest in any person not bearing the surname of Luscombe, that person should, as soon as he should be in possession of the estate, take upon himself the name of Luscombe, and use the same as for and instead of his own surname, and should, within three years then next after, procure his own name to be altered to the testator's surname of Luscombe by act of parliament, or some other effectual way for that purpose, and in case any of the persons to whom the estate was limited, and who should be in possession of the same, should not take and use the testator's surname, but should neglect to get an act of parliament, or some other authority as effectual for that purpose as aforesaid, for the space of three years next after he should be in possession, that then the estate devised for the benefit of such person so neglecting to get such act of parliament, or other authority, should cease, and become void, as if no such use or estate had been thereby devised; and the same should immediately, upon the expiration of the three years, go over to and vest in the person next in remainder or reversion, in the same manner as if such person so neglecting to change his surname was dead without issue, upon this express condition, that such person so to take did and should also take the testator's surname, and get an act of parliament, or some other authority as effectual for that purpose, otherwise the estate was to go over again. J. L. Manning, before he came of age, or entered into possession of the premises devised, took upon himself, used and bore the surname of Luscombe, and no other. But no act of parliament had ever been obtained authorizing him to change his name, nor was the king's license for that purpose obtained within three years after he so entered into possession: *Held*, that inasmuch as he bore the surname of Luscombe at the time when the estate came to him, he had substantially complied with the directions of the testator, and that he did not incur a forfeiture of that estate by not obtaining an act of parliament, or other authority, the proviso only applying to persons not bearing the surname of Luscombe at the time when the estate vested in them.

EJECTMENT to recover certain messuages, lands, &c., in the county of Devon. Plea general issue. At the trial before Wood, B., at the Spring assizes for the county of Devon, 1819, a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court on the following case:

John Luscombe of Combe Royal, in the county of Devon, being seized in fee of the premises in question, by will devised unto three trustees therein mentioned, and their heirs for ever, all that his capital messuage and tenements, barton lands and hereditaments, called Combe Royal, and other premises therein described, and the several parcels of land called Rents, enjoyed with the said last mentioned teneinent, with the rights, members and appurtenances thereof, situate in West Alvington, and all that close or parcel of land called Pye Parke, situate in the parish of Doddbrook, in the said county, with its appurtenances, and all other his freehold messuages, lands, tenements, and hereditaments, whatsoever, situate in Devon or elsewhere, with their appurtenances; upon the trusts, and to and for the several uses, and under and subject to the powers, limitations, and provisoes thereafter expressed of and concerning the same, that is to say, as for and concerning the capital mansion of the barton of Combe Royal aforesaid: upon trust to

permut and suffer his niece, Margaret Manning, wife of Richard Manning, and his niece, Mary Creed, her sister, and Juliana Jutsham, (who then lived with him at Combe Royal) and the survivor of them, to hold the said mansion house and premises, and to inhabit the said mansion house, and to take the rents of the other premises as a recompense for their maintenance and education of his cousin, John Luscombe Manning, son of the said Margaret Manning, who he willed should live therewith, and be well provided for and maintained by them in all respects suitable to his condition, until he should attain the age of 21 years, or die; and from and after the determination of that estate, as to the said mansion house and premises to be enjoyed therewith in trust for the maintenance and education of the said John Luscombe Manning, as also for and concerning all the other parts and parcels of the said barton of Combe Royal, and all other the messuages, lands, &c., devised to the said trustees and their heirs, from and immediately after the testator's decease to the use of the said trustees and their heirs in trust for his said cousin John Luscombe Manning, until he should attain the age of 21 years, or die, which ever should first happen, and to the intent that the same might be set out at a yearly rent, and the profits accumulate for his benefit until he should attain that age, or die; and from and immediately after the said John Luscombe Manning should have attained the age of 21 years, then to the use and behoof of the said John Luscombe Manning and his assigns for life, he taking and using the testator's surname of Luscombe, as for and instead of his own surname, and from and after the forfeiture or other determination of that life estate, to the use of the said trustees and their heirs for the life of the said John Luscombe Manning, upon trust to preserve the contingent remainders, and from and immediately after the decease of the said John Luscombe Manning, to the use of his first and other sons, and their heirs male, taking and using the surname of Luscombe, as for and instead of his and their own surname, and in default of such issue, to the use of the 2d, 3d, and 4th, and all and every other son and sons of the said Margaret Manning, by the said Richard Manning, her then husband, and in default of such issue, to the use and behoof of the first and other sons of Margaret Manning, by any after taken husband, severally taking and using the surname of Luscombe, as for and instead of his and their own surname, and in default of such issue, to the use and behoof of the said trustees and their heirs, for the life of Margaret Manning upon trust for her sole benefit, and after her decease, then to the trustees during the life of Mary Creed, upon trust to pay the rents and profits to her for life, with similar limitations to her first and other sons, severally taking and using the surname of Luscombe, instead of his and their own surname, and in default of such issue, then to the use of his cousin J. L. Ryan for life, he taking and using the surname of Luscombe, as for and instead of his own surname, with similar limitations to his first and other sons, and their heirs male severally taking and using the surname of Luscombe, as for his and their own surname. There then came the following proviso, "provided always, and it is my express will, and I do hereby empower, direct and appoint, that the heirs male of the several body and bodies of the said Margaret Manning and Mary Creed, and that the said John Luscombe Ryan, and the

heirs male of his body, and each and every of them respectively claiming, or that shall claim under this my will, or any of the limitations therein contained, any right, estate or title to the capital, messuage and tenement, barton lands and hereditaments, with the appurtenances therein before mentioned, called Combe Royal, in the parish of West Alvington, aforesaid, or any other of the lands or hereditaments comprised in the first* devise of this will, not bearing the surname of Luscombe; shall when, and as soon as he or they, or any of them, shall be respectively in possession of the same premises, or any part thereof, under this my will, take upon him or themselves, the name of Luscombe, and use the same as for and instead of his and their own surname, as aforesaid, and shall within three years, then next after, procure his and their own name or names to be altered and changed to my name of Luscombe, by act or acts of parliament, or some other effectual way for that purpose, and shall for ever after have use, and bear on all occasions the said surname of Luscombe for him and them, and the heirs male of his and their body and bodies, as aforesaid, and in case any or either of the heirs male of the body of the said Margaret Manning, or Mary Creed, or the said John Luscombe Ryan, as the heirs male of his body, or any or either of them respectively, who shall be in possession of the said capital messuage, barton lands, and hereditaments, called Combe Royal, or other the lands and hereditaments hereby first devised, or any part thereof, by, under, or in virtue of this my will, shall not take and use my said surname, but shall neglect to get an act of parliament or some other authority as effectual for that purpose as aforesaid, for the space of three years next, after he, she, or they shall be in possession of the same as aforesaid, that then and in such case, the use and estate hereby given, devised or limited, of and in the same premises, to and for the benefit of such person or persons so neglecting to get, or not getting such act of parliament or other authority as aforesaid, shall cease and become void as if no such use or estate had hereby given, devised or limited, and the same premises and every part thereof shall immediately, upon and after the expiration of the said three years, go over to and descend upon, and vest in such person or persons as shall be next in remainder or reversion, or unto and upon whom the said premises are hereby settled or limited in the same manner, to all intents and purposes, as if such person or persons so neglecting to change his or their surname, or surnames, was, were, or had been dead without issue of his or their body or bodies, any thing herein contained to the contrary notwithstanding. Upon this express condition, nevertheless, that such person so to take, do and shall also take my surname, and get an act of parliament or such other effectual authority, for so doing as aforesaid, otherwise the said capital messuage and barton of Combe Royal, and all the other premises hereby first devised, shall go over to the next person to whom the same are limited, as aforesaid, who shall so take my surname as aforesaid." On the 8th of June, 1776, the testator duly executed a codicil to his will, whereby

* The other devises are omitted, as they are immaterial as to the question decided.

he appointed his cousin, John Luscombe, to be a co-trustee with the three persons named in his will. Shortly after executing the codicil, viz., in July, 1776, the testator died. John Luscombe was the survivor of the four trustees named in the will and codicil, and died many years since, leaving John Hurrell Luscombe, the lessor of the plaintiff, his eldest son and heir-at-law, him surviving. Juliana Jutsham died in November, 1787, and Margaret Manning died on the 28th October, 1817, leaving only one son, viz., John Luscombe Manning, the devisee named in the will. He was born on the 28th April, 1773, and on his coming of age in the year 1794, he entered and took possession of the premises in question, and continued in possession thereof until the 29th of August, 1812, on which day he conveyed his interest to the two defendants, Yates and Hawker, for the benefit of his creditors. The other defendant, Mudge, was tenant in possession under Yates and Hawker. John Luscombe Manning, the devisee, named in the will, before he became of age, or was let into possession of the premises in question, took upon himself, used and bore the surname of Luscombe, and from thenceforth had borne and used, and still did bear and use the surname of Luscombe, and no other. But no act of parliament had ever been obtained by the said John Luscombe Manning, the devisee named in the will, authorizing him to change his name, nor did he procure his majesty's royal license for that purpose until June, 1813. John Luscombe Manning, the devisee named in the will, had been married some years, and had a son born on or about the month of October, 1806, who was still living. Mary Creed, another of the devisees, intermarried many years ago with Richard Hawkins, and was still living. The declaration in ejectment was served in 1819.

This case was argued at the sittings before Michaelmas term, by *Sugden* for the lessor of the plaintiff, and *Preston* for the defendant; and the following questions were made:

First, whether the directions of the testator as to the surname of Luscombe had, as far as respected the devisee, John Luscombe Manning, been complied with by him. Secondly, whether, in the event of those directions not having been complied with by him, the estate limited to him had thereby become forfeited. Thirdly, whether the estate limited to his first son had thereby become forfeited. Fourthly, whether the surviving trustee was, by the adverse possession of John Luscombe Manning, and the defendants as claiming under him, ever since the year 1794, when John Luscombe Manning became of age and entered into possession of the premises, barred from recovering them by virtue of the statute of limitations: and if not, Fifthly, whether the surviving trustee was entitled to recover for the benefit of Mary Hawkins, formerly Creed. It is unnecessary to report the arguments on these several points, inasmuch as the Court only pronounced judgment upon one. The arguments upon that point, were in substance as follows: For the plaintiff, it was contended, that the estate of John Luscombe Manning had been forfeited, in consequence of his not having complied with the terms of the proviso, by which it was required,

"that any party to whom the estate shall come, shall, within three years next after, get and procure his name to be altered and changed to the name of Luscombe by act of parliament, or some other effectual way for that purpose." The terms of the proviso are not satisfied by the party's having assumed the name before the estate vested in him. In *Leigh v. Leigh*, 15 Ves. 100, Lord ELDON says, "An act of parliament giving a new name does not take away the former name; a legacy given by that name might be taken. In most of the acts of parliament for this purpose, there is a special proviso to prevent the loss of the former name. The king's license is nothing more than permission to take the name, and does not give it; a name, therefore, taken in that way is by voluntary assumption." The intention of the testator in this case was, that any person taking the estate under his will, and not having his name by descent, should be compelled to take it by act of parliament, and should retain no other surname. If the party taking the estate has the name by descent, he can have no other surname; and there could be no reason, therefore, for altering it; but if he merely assumes the surname, he does not thereby lose the former surname, and, consequently, the name assumed is not his only surname, as required by the proviso. The only effectual mode of getting rid of the first surname is by an act of parliament.

For the defendants it was contended, that the proviso only applied to a person who did not actually bear the surname of Luscombe at the time when the estate came to him. In this case, J. L. Manning had taken upon himself and bore the name of Luscombe long before the estate vested in him. It is true that he had acquired that surname by assumption. It is shown, however, in Camden's Remains concerning Britain, that surnames were originally acquired by that mode; and in p. 141* that learned author gives an instance where six of the grandchildren and four great-grandchildren, descended from William Belward, by two sons, all acquired different surnames by assumption. The opinion of Lord ELDON, in the passage cited from *Leigh v. Leigh*, and that of Sir JOSEPH JEKYLL, in *Barlow v. Bateman*, 3 Peere Will. 64, are authorities to the same effect. Now it never could have been intended by the testator, that he who was legally entitled to bear his

* But for variety and alterations of names in one familie upon divers respects, I will give you one Cheeshire example for all, out of an ancient rolle belonging to Sir William Brerton of Brerton, knight, which I saw twenty years since. Not long after the conquest William Belward, lord of the moitie of Molpasse, had two sons, Dan-David of Malpasse, surnamed Le Clerke, and Richard; Dan-David had William, his eldest son, surnamed De Malpasse; his second son was named Philip Gogh, one of the issue of whose eldest sons took the name of Egerton; a third son took the name of David Golborne, and one of his sons the name of Goodman. Richard, the other son of the aforesaid William Belward, had three sons, who took also divers names, viz., Tho. de Cotgrave, Willia de Overton, and Richard Little, who had two sons, the one named Ken-clarke, and the other John Richardson. Herein you may note alterations of names in respect of habitation in Egerton, Cotgrave, Overton; in respect of colour in Gogh, that is, red; in respect of qualitie in him that was called Goodman; in respect of stature in Richard Little; in respect of learning in Ken-clarke; in respect of the father's Christian name in Richardson; all descending from William Belward. And verily the gentlemen of those so different names in Cheshire would not easily be induced to believe they were descended from one house, if it were not warranted by so ancient a proof.—*Camden's Remains concerning Britain*, ed. 1637, p. 141.

name at the time when the estate descended to him, should obtain an act of parliament for the purpose of changing his name; for suppose that J. L. Manning, having taken the surname of Luscombe, married and had children, and then died, it might as well be contended, in that case, that when the estate descended upon any of those children, that they who never had any other surname would be bound to obtain an act of parliament, making it imperative upon them to keep the surname of Luscombe. But the proviso does not absolutely require that there should be an act of parliament, but that it should be done by that means, or some other authority as effectual for that purpose. Now the assumption of the testator's surname is a mode equally effectual of acquiring the new surname as an act of parliament.

Cur. adv. vult.

And now the judgment of the Court was delivered by

ABBOTT, C. J. This case was argued in October last, before my Brothers HOLROYD and BEST, and me. Several points were urged in argument at the bar, but, as our judgment proceeds upon one only, it is not necessary to advert to the others. It appears, by the case, that John Luscombe Manning took no estate in the lands devised until he came of age: and it is found, that before he came of age, and before he was let into possession, he took upon himself the surname of Luscombe, and has ever since borne and used the surname of Luscombe, and no other; so that he has undoubtedly, in this respect, complied with the words of the direction contained in the clause whereby the lands are given to him, and has in substance complied with the desire and intention of the testator, which was, that the person who enjoyed his lands should bear his name. But it is said that he did not comply with the terms of the proviso, because, although he had taken and used the surname of Luscombe before he came to the estate, yet he did not, within three years after he took possession of the estate, take that name by virtue of an act of parliament, or other authority for that purpose, and that therefore the estate was, by that omission, for ever gone from him, and not from him alone, but also from his son, who would, upon the death of his father, have taken an estate tail under the will, if his father had, within three years, obtained an act of parliament, or other sufficient authority; but before we pronounce a judgment to this effect, under the circumstances that I have mentioned, it behooves us, in a case wherein the general intent of the testator, directing the course in which his land should be enjoyed, has been, as I have before observed, substantially complied with in regard to the name, to look carefully into the words of the proviso, and see who and what description of persons are contained within it. And we are to consider, that this is a proviso introduced to defeat an estate, already vested, for the breach of a condition subsequent, and is in the nature of a forfeiture, and consequently that the words of it must, according to general rules and principles, be construed strictly, and effect must not be given to it, unless the supposed intention of the testator be expressed in plain and unambigudus language. The proviso consists of two parts. The description in the first part is, "the heirs male of the several bodies of Margaret Manning, and

of Mary Creed, and John L. Ryan, and the heirs male of his body *not bearing the surname of Luscombe.*" These are the persons required to take that surname. In the second part of the proviso, and which contains the devise over, the words "*not bearing the surname of Luscombe,*" do not again occur; but this second part must be taken with reference to the first; and in this part other words of the same import do occur, for the lands are to vest in the person who would be next entitled to take, if the person so neglecting to change his surname was or had been dead without issue of his body. This then introduces the question, what sense and meaning ought, in the legal construction of this proviso, to be put upon the words "*not bearing the surname of Luscombe:*" whether a bearing of that name *de facto* be sufficient, or whether it is requisite that it should be borne by authority of an act of parliament, or other special authority? If the testator had clearly intended the bearing of this name by virtue of some particular authority, it would have been very easy to have expressed that intention. He might have said, "*not bearing the name by virtue of an act of parliament, or some other authority as effectual;*" according to the expressions used in another part of the proviso: or he might in some way have referred to that part of the proviso, as by saying, "*not bearing the name as hereinafter mentioned,*" or something to that effect. Whereas nothing of this kind occurs in this part of the will, but the words are general and simple, "*not bearing the surname of Luscombe;*" so that if any qualifications is to be introduced, it can only be done by the addition of some other words, and such addition must be made by implication or intendment. But we think we ought not to make this addition for two reasons; first, because the effect of this clause, as before observed, is to defeat and divest an estate actually vested; and, second, because such an implication or intendment is not necessary to effect the general object and intention of the testator. For a name assumed by the voluntary act of a young man at his outset into life, adopted by all who knew him, and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually *his* name as if he had obtained an act of parliament to confer it upon him. We would not be understood to say that where a testator expressly requires a name to be taken by act of parliament, or other specified mode, any mode falling short of the specified mode may be substituted for it; or to say, that under this particular will a voluntary assumption of the name after the party became possessed of the estate would be sufficient. All we mean is this, that as the testator has annexed no express qualification to the words, *bearing the surname of Luscombe*, and the word surname is not used in this will to denote a name inherited from the father, and as a bearing *de facto*, answers every useful purpose that could be obtained under the authority of an act of parliament, a bearing *de facto*, though by voluntary assumption, is sufficient to satisfy the general and ordinary meaning of the words "*bearing the surname;*" and we cannot say with certainty that the testator intended any thing more, or meant to use the words in that qualified and restrained sense which must be given to them in order to pronounce that the condition has been broken, and that the

estate shall pass over to another claimant. For these reasons we, who heard the argument, are of opinion, that a nonsuit should be entered.
Judgment of nonsuit.

HANSON and Another v. ARMITAGE.—p. 557.

A., a merchant in London, had been in the habit of selling goods to B., resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B. by the first ship. In pursuance of a parol order from B., goods were delivered to and accepted by the wharfinger to be forwarded in the usual manner: *Held*, that this not being an acceptance by the buyer, was not sufficient to take the case out of the 29 Cor. 2, c. 3, s. 17.

ASSUMPSIT for the price of two chests of tea. Plea, general issue. At the trial before ABBOTT, C. J., at the Middlesex sittings after Hilary term, 1821, the following appeared to be the facts of the case: The plaintiffs, who were wholesale tea-dealers in London, had been in the habit of shipping teas to the defendant, who was a grocer, resident at Barnsley in Yorkshire. The usual course was to deliver the tea at the wharf of one Staunton in London, to be forwarded by the first ship; and several parcels of tea, sent in this manner, had been paid for by the defendant. On the 3d June, 1821, the plaintiffs delivered at Staunton's wharf two chests of tea, to be forwarded to the defendant in the usual manner. The vessel in which this tea was shipped was lost on her voyage. The plaintiffs, on the 10th of June, transmitted by post to the defendant an invoice of the tea, and on the 13th, the defendant returned the same by post, and stated "that he had nothing to do with it, as he had heard of the loss of the ship before the invoice arrived, and that he would not take to the account." There was no other evidence of any order having been given to the plaintiffs for the tea in question; upon these facts the Lord Chief Justice directed the jury that they might fairly presume that the defendant had given a parol order for the tea, and stated that he would reserve the question for the opinion of the Court, whether the delivery of the tea, and the acceptance of it by the wharfinger for the purpose of transmitting it by the usual conveyance, was to be deemed an acceptance by the buyer within the meaning of the 29 Car. 2, c. 3, s. 17. The jury having found a verdict for the plaintiffs, a rule nisi was obtained in last Easter term for entering a nonsuit, against which

Scarlett and Littledale now showed cause. The acceptance of the tea by the wharfinger was a sufficient acceptance by the buyer to satisfy the 29 Car. 2, c. 3, s. 17. Staunton was the agent of the defendant; for the jury having found that there was an order for these goods, it must be taken that there was an order to send them by the usual mode of conveyance. The acceptance therefore by Staunton was an acceptance by the defendant. This case is distinguishable from *Astey v. Emery*, 4 Maule & S. 262, for there the seller undertook the risk of conveying the goods to the purchaser.

Gurney and Chitty, contra. The statute 29 Car. 2, c. 3, s. 17, enacts, "that no contract for the sale of goods for the price of 10*l*. shall be binding, except the buyer shall accept part of the goods so sold, and *actually* receive the same." Here there has been no acceptance by the buyer, but by a person who was an agent only for the purpose of shipping the goods, and which agent had no opportunity of objecting to the quality. To make it a sufficient acceptance by the buyer within the statute, the latter ought to have had an opportunity of objecting to the quality of the goods, *Kent v. Huskisson*, 3 Bos. & P. 232, and *Howe v. Palmer*, 3 Barn. & A. 321. In *Astey v. Emery*, the goods were actually shipped on board a vessel, named by the buyer, and yet that was held not to be a sufficient acceptance. They also cited *Dawes v. Peck*, 8 T. R. 830. *Cur. adv. vult.*

ABBOTT, C. J., in the course of the term, delivered the judgment of the Court, and after stating the point reserved for their consideration, viz. whether there had been a sufficient acceptance of the goods to take the case out of the statute of frauds, added, that the Court were of opinion that the acceptance in this case, not being by the party himself, was not sufficient: and he referred to the case of *Howe v. Palmer*, where it was held that there could be no actual acceptance so long as the buyer continued to have a right to object either to the quantum or quality of the goods.

Rule absolute for a nonsuit.

RULES OF COURT.—p. 559.

IT IS ORDERED, That from and after the last day of this term, whenever two or more notices of justification of bail shall have been given, before the notice on which bail shall appear to justify, no bail be permitted to justify without first paying (or securing, to the satisfaction of the plaintiff, his attorney or agent) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them, may not have been changed; and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected.

By the Court.

IT IS ORDERED, That from henceforth, no clerk, turnkey, officer, or other person, employed by or under the marshal, shall receive or take, except from the marshal, any fee, gratuity, or reward, for or in respect of making inquiry into the sufficiency of any person or persons proposed or intended to give security upon the granting of the rules of the King's Bench prison, or otherwise in respect of the granting of the said rules. And that the marshal do dismiss any person who shall offend herein. AND IT IS FURTHER ORDERED, That a copy of this rule be kept hung up in the said prison, in the place where the table of fees is hung up.

By the Court.

In order to prevent the fraudulent issuing of any writ of execution, without a judgment to support it, IT IS ORDERED, That the sealer of the writs of this court shall not seal any writ of *feri facias*, or *capias ad*

• *satisfaciendum*, without having the judgment-paper, *postea*, or inquisition, produced to him. AND IT IS FURTHER ORDERED, That the attorney concerned for the plaintiff in the cause, or his agent, shall, upon all *bailable mesne process*, and every *writ of attachment*, and *fieri facias*, and *capias ad satisfaciendum*, endorse the place of abode, and addition of the party against whom the writ is issued (or such other description of him as such attorney or agent may be able to give). AND IT IS ALSO ORDERED, That no judgment be signed upon any *cognovit*, without such *cognovit* being first produced to the clerk of the dockets, and, after taxation of the costs, filed with him. By the Court.

END OF HILARY TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
Easter Term,
IN THE
Third Year of the Reign of GEORGE IV., 1822.

GOLDING RAY the Younger v. PUNG.*—p. 561.

Certain lands were conveyed to A. B., his heirs and assigns, in trust, to such uses as C. D. should by deed appoint; and in default of, and until appointment, to the use of C. D. in fee. C. D. afterwards, in execution of the power, by deed duly made an appointment of the said estates in favour of E. F. in fee. C. D., at the time of making the appointment, was married. His wife was held not to be dowable out of these lands.

THE Vice Chancellor sent the following case for the opinion of this Court:

By indentures of lease and release, dated the 25th and 26th September, 1800, certain lands, &c., in Essex, were duly conveyed and assigned to Golding Ray the elder, his heirs and assigns, as trustee, to the use of such persons, and for such estates, and in such proportions, and for such terms of years, and under such provisos, &c., and subject to such charges, and in such manner as James Ray, by any deed or deeds by him signed, sealed and executed in the presence of, and attested by two or more credible witnesses, should from time to time declare, direct, limit, or appoint the same; and as to the estate or estates so to be appointed, if any should be, which should respectively end and determine; and as to such part and parts of the said premises whereof no such declaration, limitation, or appointment should be made, and in default of, and in the meantime, until any such should be made, to the use of James Ray, his heirs and assigns, for ever. James Ray

* See 5 Mad. 310, S. C.

afterwards duly made, and executed, in the presence of two credible witnesses, certain indentures of lease, appointment, and release, dated the 29th and 30th of March, 1816; by which it was witnessed, that James Ray, for the valuable consideration therein mentioned, by virtue of the power or authority to him given by the first-mentioned indentures, and of all and every other power and powers, him in any wise enabling in that behalf, did irrevocably declare, limit, and appoint, that all the said lands, &c., should, from and after the execution of those indentures, remain and be to the uses upon the trusts, and for the intents and purposes thereafter limited, expressed, and declared concerning the same; and by the same indenture it was also witnessed, that for the consideration aforesaid, and for further assurance, James Ray did grant, bargain, sell, release, and confirm unto the plaintiff, Golding Ray, the younger, in his possession then being by virtue of the said lease, and to his heirs, the said lands, &c.; to hold the same unto the said Golding Ray the younger, his heirs and assigns, to the uses, upon the trusts, and for the intents and purposes thereafter expressed and declared concerning the same; and it was by the same indenture declared, that as well the appointment as also the grant and release thereinbefore contained, should respectively operate and enure to certain uses, and upon certain trusts therein expressed and contained in favour of Golding Ray the younger. James Ray, at the time of the execution of the last-mentioned indentures in 1816, was married: and he and his wife are still living. The question for the opinion of the Court was, whether, under the circumstances, the wife of James Ray would be dowable out of the lands, tenements, and hereditaments comprised in the hereinbefore stated indentures, in case of her surviving her husband. The case was argued at the sittings before last Michaelmas term, by

Preston, for the plaintiff. The right to dower was defeated by the execution of the power. It may be propounded as a general rule, that if an estate be conveyed regularly and formally to such uses as the settlor shall appoint, and in the meantime, and until appointment, to the use of himself and his heirs, the settlor has a qualified and determinable fee, to continue until by the exercise of the power of appointment, the fee shall vest in the person to whom it shall be appointed.* To this fee dower is incidental; the wife is dowable of it while it continues, and so far as her title to dower may not be excluded, postponed, or defeated by appointment. When the settlor makes an appointment, a new use springs up and vests in the appointee, and the fee originally limited to the settlor will cease; and, with it, the right of the wife to her dower, in respect of this fee, will also be defeated. From that time, the use appointed under the power will take effect in the same manner as if it had been inserted in the original deed creating the power, and as if it had stood in the place of the power. If no appointment is made, the fee, from being qualified and determinable, becomes simple and absolute. *Tickner v. Tickner*, 8 Atkyns, 742, and *Sir Edward Clere's case*, 6 Rep. 17 b; and the

* Butler's note to Co. Litt. 216 a, and 241 a.

language of Lord ELDON in *Maundrell v. Maundrell*,* are authorities to prove that a power and a fee may well subsist distinctly in the same person, and that the power is not merged in the fee. It is true, that a different doctrine, which has occasioned great surprise in the profession, was laid down in *Goodill v. Brigham*, 1 Bos. & Pul. 192; but that doctrine cannot be supported. The decision in that case was right, because the wife was seised by the rules of the common law, and not under the learning of uses: and she had not any power distinct from the fee. This mode of limiting uses was the original form adopted by conveyancers for the express purpose of enabling the husband to defeat any claim of dower.† Dower is a derivative interest, and when the estate of the husband ceases, the wife's right to dower also ceases. The general rule, *cessante statu primitivo cessat et derivativus*, applies to this case. The appointee under the power takes as if the estate had been limited to him by the deed creating the power; he therefore is in quasi by the act of the donor, and the case is to be considered as if the husband never had taken the fee. For that fee was defeated, and never became absolute; and in the result the wife is, therefore, not dowable. Her title to dower was as defeasible as her husband's fee, and was defeated when that fee was overreached and avoided by the operation of the appointment made in exercise of the power. In *Maundrell v. Maundrell*, 10 Ves. 255, Lord ELDON says, "The fee vests until the execution of the power, and the execution of the power is a limitation of the use, under and by the effect of the instrument by which the power was reserved. When a conveyance operates on the fee only, and there is not any execution of the power, then dower attaches; but when the power is executed, the right to dower is extinguished." The opinion of HEATH, J., in *Cave v. Holford*, 3 Ves. jun. 657, is an authority to the same effect. When a doubt was expressed by Lord ALVANLEY, in *Cox v. Chamberlain*, 4 Ves. jun. 631, the point was not judicially before him. In the case of *Sammes v. Payne*, 1 Leon, 168, and *Buckworth v. Thirkell*, 3 Bos. & Pul. 652, the question was, whether the husband was entitled to curtesy, and that is a very different question from the present. Besides, the authority of the latter case‡ has been frequently questioned. In *Moreton v. Lees*, Sugden on Powers, 389, a case exactly like the present, it was expressly held by RICHARDS, C. B., and WOOD, B., that an appointment of the fee by the husband defeated the wife's right to dower out of the fee, which was itself defeated by the execution of the power. And in *Roach v. Wadham*, 5 East, 283, the wife's dower was considered as defeated by the appointment. The plaintiff, therefore, is entitled to the judgment of the Court.

Barber, for the defendant. The fee in this case was vested in James Ray, subject to a power in him to appoint the fee; and being once vested in him, the wife's right to dower accrued; and he could not, by executing the appointment under the power, divest that right. *Cunningham v. Moody*, 1 Ves. sen. 174, and *Doe v. Martin*, 4 T. R.

* *Maundrell v. Maundrell*, 10 Ves. 255.

† *Fearne's Reminders*, 346, edit. 1809.

‡ *Parks on Dower*, 181. *Sugden on Powers*, 388. *Butler, Co. Litt.* 241 n.

39, are authorities expressly in point to show that the fee was vested in James Ray until he executed the power. In *Goodill v. Brigham*, 1 Bos. & Pul. 192, there was a devise in fee to a feme covert, with a power to dispose of the estate without the control of her husband; that power was held to be void, as being inconsistent with the fee given to her in the first instance. And in *Cox v. Chamberlain*, 4 Ves. 681, Lord ALVANLEY, commenting upon the case of *Goodill v. Brigham*, says, "I do not conceive the Judges meant to decide, that where there is a conveyance to such uses as a man shall appoint, and in default of appointment, to his own right heirs, the party may not, under the power, create an estate that will supersede the estate in fee, though not perhaps, to bar dower." In *Maundrell v. Maundrell*, 7 Ves. 567, where a husband had a power of appointment, and in default thereof an estate for life, remainder to his heirs, the Master of the Rolls held, that if the power was good, yet that a purchaser, taking by a conveyance adapted to pass the interest of the estate as a limitation of the fee, and not as an appointment, was subject to the wife's claim of dower; and in delivering the judgment, he says, "The power of appointment is merely nugatory, and nothing distinct or different from the fee: the fee was clearly in the husband, until appointment. In *Goodill v. Brigham* it was held, that a power added to the fee was merely void. So the power in this case, followed by a limitation of the fee, must be absorbed in the fee, which includes every power. The reason commonly given why a power may have effect, though limited to the owner of the fee, is, that he may appoint in a mode by which his legal fee would not entitle him to convey. I give no opinion upon the sufficiency of that reason; but in this case, it is to such uses as he should by deed or will appoint, that is, by deed or will, legally executed; and by those instruments he might have passed the fee, though nothing was said about the appointment: the limitation, therefore, operates purely as a limitation of the fee, and that fee he could only convey, subject to her right of dower." It is true, that in *Maundrell v. Maundrell*, 10 Ves. 246, Lord ELDON expresses a decided opinion, that a power capable of being executed may be reserved to the person having the fee; but he does not say that the consequence of executing the power would be to deprive the wife of dower. In *Cross v. Hudson*, 8 Bro. C. C. 80, the party had the power to charge an estate, of which he was tenant for life, with intermediate remainders, with a contingent fee to himself; and the contingent fee afterwards came to him: Lord THURLOW held, that the power was merged. In *Wilde v. Forte*, 4 Taunt. 386, it was held, that the wife was entitled to dower. In *Sammes v. Payne*, 1 Leon. 168, Golds. 81,* ANDERSON, J., lays it down, that "If a feoffment be made to the use of I. S. and his heirs, until I. D. hath done such a thing, and then unto the use of J. D. and his heirs, the thing is done, and J. S. dieth, his wife shall be endowed." In *Buckworth v. Thirkell*, 8 Bos. & Pul. 652, and Col. Jur. 832, there was a devise to trustees in fee, in trust to receive the rents and profits, and apply them for the maintenance of Mary Barr, until she should arrive at the age of 21 years, or be married; and upon her attaining

* And see Parke on Dower, 169.

such age, or being married, then to her in fee; but in case she should happen to die before she arrived at the age of 21 years, and without leaving issue, then there was a devise over. Mary Barr married and had a child, and afterwards died under the age of 21 years, without leaving issue. The Court of King's Bench were of opinion that her husband became entitled, by the curtesy, to the estate for his life. In this case, therefore, the wife is entitled to dower. *Cur. adv. vult.*

The following certificate was afterwards sent:

This case has been argued before us; and we are of opinion, that, under the circumstances, the wife of James Ray will not be dowable out of the lands, tenements, and hereditaments comprised in the heretofore stated indentures, in case of her surviving her husband.

C. ABBOTT,
J. BAYLEY,
G. S. HOLROYD,
W. D. BEST.

The Earl and Countess of JERSEY and Others v. DEANE.—p. 569.

By marriage settlement, dated December, 1806, certain manors and lands were limited to the husband for life; remainder to the wife for life; remainder to the use of the first and other sons of the marriage successively in tail male; remainder in case the wife should survive the husband, to her in fee; but if she should die in the lifetime of her husband, remainder to the daughters successively in tail male; remainder to the use of such persons related by blood or consanguinity, and in such estates or interests, and in such manner, and charged with such sums of money in favour of such persons so related, as she by her will might appoint; and in case of no such appointment, to her in fee. The settlement also contained a power for the trustees there named, at the request and by the direction of the husband and wife, or the survivor, to sell or exchange the settled estates, and for that purpose, to revoke all and any of the uses contained in the settlement; and also a covenant by the husband for further assurance on his part, and that of his wife, and all persons claiming under him. In pursuance of this settlement, certain fines were levied. By deed dated March, 1807, reciting the settlement, and the fines levied in pursuance thereof, and the limitations therein contained, and further, that the wife was desirous of acquiring an absolute power of appointment over the manors, &c., comprised in the settlement, in the event of her surviving, or dying in the lifetime of her husband, and there being a general failure of issue of her body, inheritable to the manors, &c., under the settlement, the husband and wife covenanted to levy certain fines, sur consance de droit come ceo, with proclamations, to J. G. and his heirs, of all the manors, &c., comprised in the settlement; which fines were to operate, and to be taken to operate first for corroborating the uses contained in the settlement antecedently to the limitations to the use of the wife in fee-simple, and subject thereto to the use of such persons, &c., as the wife by will or deed might appoint. In pursuance of this latter deed, several fines come ceo were levied by the husband and wife: *Held*, that under these circumstances, these latter fines did not operate to extinguish, destroy, or suspend the right or power of the husband and wife, and the survivor of them, to request and direct a sale or exchange of the settled estates under the powers for that purpose contained in the settlement, so as to prevent an exercise of those powers by the trustees.

THE Vice Chancellor sent the following case for the opinion of this Court. By indentures of lease and release, dated the 15th and 16th December, 1806, being the settlement made after, but in pursuance of articles entered into before the marriage of the Earl of Jersey with the Countess of Jersey, his wife, and by certain fines duly levied by the

Earl of Jersey and his wife, certain hereditaments, the inheritance of the Countess of Jersey, were limited to the use of T. F. and John Lord B., their executors, &c., for ninety-nine years, to commence from the 23d of May, 1804, but upon the trusts thereafter mentioned; with remainder to the use of the Earl of Jersey and his assigns, for his life, without impeachment of waste, &c.; with remainder to the use of the Duke of Bedford, &c., as trustees, to support contingent remainders; with remainder, in case the Earl of Jersey should die in the lifetime of the Countess of Jersey, leaving issue an eldest or only son, entitled to the said hereditaments, immediately expectant upon the decease of the Countess of Jersey, and who should, at the decease of the Earl of Jersey, have attained, or should, during the life of the Countess of Jersey, attain twenty-one, then to the intent that he, after attaining twenty-one, and during the joint lives of himself and the Countess of Jersey, should receive a certain yearly rent-charge therein mentioned, payable out of the said hereditaments, with usual powers of entry, &c., for better securing the due payment of the same; and subject thereto to the use of the Earl of Clarendon, and Lord Lowther, their executors, &c., for the term of one thousand years, to commence from the decease of the Earl of Jersey, without impeachment of waste, upon certain trusts; with remainder to the use of the Countess of Jersey, and her assigns, for her life, without impeachment of waste, &c.: with remainder to the use of the Duke of Bedford, &c.: as trustees, to support contingent remainders; with remainder to the use of the first and every other son of the marriage successively, in tail male; with remainder, in case the Countess of Jersey should survive the Earl, to the use of her, her heirs and assigns for ever; but in case she should die in the lifetime of the Earl, then to the use of the first, and every other the daughter and daughters of the marriage successively, in tail male; with remainder to the use of such person or persons related by blood or consanguinity to the Countess of Jersey, and for such estates or interests, and in such manner, and subject to, and charged or chargeable with, such annual or other sums of money in favour of such persons so related, and subject to such powers, &c., (such sums of money, powers, &c., being for the benefit of some one or more persons, related by blood or consanguinity to the Countess of Jersey,) and in such manner as the Countess of Jersey, notwithstanding her coverture, by her last will in writing, or by any codicil thereto, signed and published in the presence of three or more credible witnesses, should direct, limit, or appoint, and in default of such direction, &c., and so far as any such, if incomplete, should not extend, to the use of the said Countess in fee. And it was by the said indenture of release, among other things, declared, that it should, and might be lawful to and for the Duke of Bedford, &c., and the survivors or survivor of them, and the executors and administrators of such survivors, at any time or times thereafter, at the request and by the direction of the Earl and Countess of Jersey, during their joint lives, and of the survivor of them, testified by some writing under their respective hands and seals, or under the hand and seal of the survivor, attested by two or more

credible witnesses, to dispose of, either by way of absolute sale, or in exchange for, or in lieu of other lands, &c., to be situate somewhere in England, all or any part of the manors, &c., thereby granted and released, (except the mansion house, &c., called Osterly,) and the inheritance thereof in fee simple, to any persons whomsoever, for such price, or for such equivalent, in manors, lands, &c., as to the said Duke of Bedford, &c., or the survivors or survivor, &c., should seem reasonable; and that, for the purpose of effecting such sale or exchanges, it should be lawful for the said Duke of Bedford, &c., the survivors and survivor of them, &c., at such request, and by such directions, and so testified as aforesaid, by any deed or deeds, instrument or instruments in writing, sealed and delivered in the presence of, and attested by, two or more credible witnesses, absolutely to revoke, determine, and make void all and any of the uses, trusts, powers, &c., therein contained, of and concerning the hereditaments so proposed to be sold or exchanged, or any part thereof; and by the same or any other deed or deeds to limit, &c., any uses, estates, or trusts of the said hereditaments, the uses of which should be so revoked, which it should be thought expedient to limit, &c., in order to effectuate such sales or exchanges; and that it should likewise be lawful for them to give effectual discharges and receipts to the purchasers, upon payment of their respective purchase moneys. And in the said indenture of settlement was contained a covenant by the Earl of Jersey, for further assurance on his part, and on the part of the Countess of Jersey, and all persons claiming under him the said Earl of Jersey.

By an indenture bearing date the 20th day of March, 1807, and made between the Earl and Countess of Jersey, his wife, of the one part, and T. G., of the other part, reciting the said indentures of lease and release of the 15th and 16th days of December, 1806, and the fines levied in pursuance thereof, and the limitations contained in the settlement, and reciting that the said Countess of Jersey was desirous of acquiring an absolute power of appointment over the manors and other hereditaments comprised in the settlement, on the event either of her surviving or dying in the lifetime of the said Earl of Jersey, and there being a general failure of issue of her body inheritable to the said manors and other hereditaments under the limitations contained in the settlement, it was witnessed that, for the purpose thereinbefore mentioned, the Earl of Jersey did thereby, for himself, his heirs, &c., and for the Countess of Jersey, his wife, (she thereby consenting thereto,) covenant and grant to T. G., his heirs and assigns, that they the Earl and Countess of Jersey would, as of Easter or Trinity term, 1807, or some other subsequent term, at the costs of the Countess of Jersey, levy nine or more fines, *sur conuzance de droit como oso*, &c., with proclamations, unto the said T. G. and his heirs, of all the manors, &c., mentioned and conveyed by the above settlement, and fines levied in pursuance thereof, with their respective rights; and it was thereby agreed and declared, between the said parties thereto, that as well the said fines so as aforesaid, or in any other manner so to be had and levied, and also all other fines, common recoveries, &c., already or there-

after to be levied, suffered, or executed between the said parties thereto, of the said manors, &c., should, immediately after the levying, suffering, and perfecting of the same, respectively operate and be taken to operate, first, for corroborating the several uses, trusts, &c., limited, expressed, and contained, of and concerning the said manors, &c., by the settlement, antecedently to the several limitations therein respectively contained to the use of the Countess of Jersey, in fee simple; and after the expiration or sooner determination of the several uses, trusts, &c., and in the meantime subject to the same respectively, to the use of such persons, for such estates, upon such trusts, &c., and subject to such powers, &c., as the Countess of Jersey, by any deed or deeds, &c., with or without power of revocation or new appointment, to be sealed and delivered by her, in the presence of two or more credible witnesses, or by her last will in writing, or any codicil thereto, or any writing purporting to be her last will, or any codicil thereto, signed and published in the presence of three or more credible witnesses, should from time to time, either in the lifetime of the Earl of Jersey, or after his decease, and notwithstanding her then present or any future marriage, direct, limit, or appoint; and in default or until such direction, limitation, or appointment, or so far as any such direction, limitation, or appointment should not extend, to the use of the Countess of Jersey, her heirs and assigns, for ever. In pursuance of the covenant for that purpose contained in the last-mentioned indenture, nine several fines, sur conuzance de droit come ceo, &c., were duly levied by the Earl of Jersey and his wife, in Trinity term, 1807, of the several manors, &c., in the above indentures mentioned. On the 15th day of June, 1816, certain freehold lands and hereditaments comprised in the said recited indentures were put up for sale, and the defendant, Ralph Deane, became the purchaser, for the sum of 4010*l.*, and paid a deposit of 20*l.* per cent. upon the purchase-money, and signed a written agreement to complete his purchase on or before the 11th day of October, 1816, on having a good title made. The question for the opinion of the Court was, whether the fines levied by the Earl and Countess of Jersey, in Trinity term, 1807, did or did not operate to extinguish, destroy, or suspend the power or right of the Earl and Countess, and the survivor of them, to request and direct a sale or exchange of the settled estates under the powers for that purpose contained in their marriage settlement, so as to prevent an exercise of those powers by the trustees of the settlement. The case was argued in last Michaelmas term, by

Lynch, for the plaintiff, who contended, first, that the fines were levied by persons one of whom had the fee, and that they were a rightful and not a wrongful or divesting assurance. Second, that although a fine is an acknowledgment upon record of a fee simple in the conusee and will, unless controlled by the agreement of the parties, have a divesting operation; yet that its operation is not of that inflexible nature, but that it bends to and is controlled by the agreement of the parties, for the purpose of effecting any particular or special purpose. Thirdly, that the fines were by the settlors, and were expressly, and were so declared to be, for further assurance, and in confirmation of the prior uses contained in the settlement.

Bredon's case, 1 Rep. 76 a, is an authority in support of the first point: there, tenant for life and first remainder-man in tail joined in a fine, come ceo; and yet the Court held it no discontinuance either of the first or second remainder in tail, because each of the parties joining in the fine gave but that only which he might lawfully give, viz. the tenant for life his estate, and he in the remainder a fee simple, determinable on his estate tail; and so it was held no forfeiture of the estate of the tenant for life. In *The Earl of Clanrickard's case*, Hob. 273, this doctrine was confirmed by Lord HOBART; and in *Treport's case*, 6 Rep. 15, POPHAM, C. J., says, "If tenant for life, and he in reversion, make a gift in tail, rendering rent, the lessee shall have the rent during his life, for the making of a greater estate than he has, is not any forfeiture, because he joins with him in reversion." Lord HOLT's argument in *Lane v. Vane*, Sir T. Jones, 98, puts the question on the same ground, and confirms the authority of the preceding cases. The case of *Smith v. Clyfford*, 1 T. R. 738, is also in point. There the tenant for life having himself a distant remainder in tail, suffered a recovery; and though there was in that case an intermediate estate, yet it was held to be no ground of forfeiture, because he had not taken upon himself to do any act inconsistent with his life-estate. Yet in that case there was no intention shown, as here, to preserve the intermediate estate; and that case, therefore, is stronger in favour of the position contended for. It may be said, that that was the case of a recovery, where the tenant for life having parted with his estate for life at the time, was vouched only in respect of his estate tail; but the judgment did not proceed on that ground; for *Pelham's case*, 1 Rep. 14, was also the case of a recovery, and yet held a forfeiture. It is indeed remarkable, that in 2 Rep. 74, and 10 Rep. 44, Lord COKE cites *Pelham's case* as one of a tenant for life suffering a recovery, and conveying away the fee. The case, however, was overruled by *Smith v. Clyfford*; and it is not true that in the latter case, the tenant for life had not the estate for life in him when vouched. For 2 Inst. 241, and Com. Dig. tit. Voucher, both show that the vouchee stands in the place of the tenant; and that the demandant counts against him for the whole fee. *Garrett v. Blizard*, 1 Roll. Ab. 835, will be cited on the other side; but that case turned on the intention of the parties, which was to do an act inconsistent with the intermediate estate. Here there was no such intention, and therefore this fine produced no forfeiture; besides, in this case, Lady Jersey had the first estate of inheritance. *Roper v. Halifax*, Sugden on Powers, last edit. 55, Appendix, 641, is also an authority in point. But it will be contended, that the effect of a fine is so powerful, that although these parties meant to confirm the prior uses and estates, yet they are divested; and that though the old seisin is affirmed, yet that it is defeated. But this is not so; for, secondly, although a fine is an acknowledgment upon record of a fee simple in the conusee, and will, unless controlled by the agreement of the parties, have a divesting operation; yet its operation is not of that inflexible nature, but that it bends to and is controlled by the agreement of the parties, for the purpose of effecting any particular or spe-

cial purpose. In support of this proposition, *Puttenham v. Duncombe*, 2 Dyer, 157 b, may be cited: there a fine was held to be controlled by the former indenture, which shall rule the fine. So also Fitz. H. Estoppel, 211, and the third resolution in *Cromwel's case*, 2 Rep. 69 b. *Perrot's case*, Moore, 884; *Anonymous*, Skinner, 238, are to the same effect. And *Bullock v. Thorne*, Moore, 615; *Earl of Leicester's case*, 1 Vent. 278; and *Herring v. Brown*, Carth. 22, 1 Vent. 368. S. C., show that it is entirely a question of intention, and that the operation of a fine is to be controlled by the agreement of the parties. These latter cases, it may be said, are those where a fine, coupled with a deed, has been held an execution of the power, but that they do not show that it can operate as a confirmation. But there is no real difference between the two cases; for if the displacing and destroying power of the fine be prevented by the object of the parties being to execute a power, why should not the same effect be produced by the object of the parties being to confirm a power? The innocent intention of the party levying the fine is the same in both cases, and that is the cause why the fine is prevented from extinguishing the power. Many cases may indeed be found where tenants for life levying fines have incurred forfeiture; but all these cases will be found either to be where there was a clear intention to gain a fee, or where, from their incautiously omitting to declare the uses, the Court have been obliged to presume that intention. *Smith v. Abell*, 2 Lev. 202; *Albany's case*, 1 Rep. 110; *Digges's case*, 1 Rep. 173, show this: and in the last case the uses declared by the deed intended to be enrolled were different from the uses declared by the deed by which the fine was covenanted to be levied; and, therefore, the two could not be connected together. Cases may be cited, no doubt, to show that the operation of a fine is so strong, that when a man makes a will, and afterwards levies a fine, the fine is a revocation of the will; but this goes on the ground, that in order to render a devise valid, the seisin of the deviser must remain unaltered from the execution of the will till his death. This explains the case of *Lutwich v. Mutton*, 8 Viner, 133, unless, indeed, that case be considered as overruled by *Selwyn v. Selwyn*, 2 Burr. 1131. But, thirdly, in this case the fines were levied by the settlors, and were expressly, and were declared to be for further assurance, and in confirmation of the prior uses contained in the settlement. In the case of *Selwyn v. Selwyn*, the ground of the decision was, that the whole was taken as one conveyance, which must relate to the bargain and sale; and *Roe v. Griffiths*, 4 Burr. 1952, is to the same effect. And if a person convey by lease and release to the use of himself for life, with remainders over, and covenants to levy a fine, and the fine is levied in a subsequent term, the fine operates to confirm the uses declared by the deed. This shows that a fine is controllable by the act of the parties. Here the fine is not only connected with the deed of covenant, but also with the original settlement, by means of the covenant for further assurance. Now, if the fine had all that divesting and displacing operation attributed to it, it could not confirm all the prior charges and incumbrances of the tenant in tail: it is also equally clear law, that if tenant in tail con-

veys his estate to several uses, in strict settlement, reserving the reversion in fee, and then levies a fine to other uses, it confirms the uses declared by the prior settlement, subject to the operation to the uses declared of the fine. *Goodright v. Mead*, 8 Burr. 1703. If that be so, the fine levied by Lord and Lady Jersey, even if it had not been expressed as it is in the deed of covenant to be for the corroboration of the former estates, yet would operate to confirm the prior uses. Here the fine was in obedience to, and performance of, the covenant for further assurance on the part of Lord and Lady Jersey; they were the settlors in the settlement, and the consors in the fine: one of them had the fee, the first estate of inheritance; and they were persons in a situation to give further assurance. *Ferrers and Curzon v. Fermor*, Cro. Jac. 648, is a very strong case for the plaintiffs: there the Court, for the purpose of upholding and preserving the estate for years in the lessee, and which, according to the strict rules of law, must have been considered merged, held the whole as one assurance; and that case was approved and acknowledged as authority in *Selwyn v. Selwyn*; here the covenant for further assurance so connects the deed of the 20th of March, 1807, and the fines levied in pursuance thereof, with the original settlement, as to make it one assurance. If it operates as a further assurance, it must, consequently, operate as part of the original assurance: besides, the parties to the settlement might plead this fine as part of their documents of the title; and yet it is contended, that that which forms actually a part of the title destroys that title. As far as intention goes, it is quite clear that the parties never intended to disturb the settlement. Then, if it can operate as a further assurance, and consequently, is part of the original assurance, why should it defeat or divest the seisin? But even if the intention did not appear on the face of the deed, still the law would intend a rightful rather than a wrongful motive, particularly so when it is for the benefit of the persons in remainder that the fine should be considered for further assurance, and as a confirmation rather than a wrongful alienation. *Cromwel's case* is one authority to show that the Court will construe several conveyances as a part of the same assurance, for the purpose of effectuating the intention of the parties; and in the case of *Doe v. Whitehead*, 2 Burr. 704, Lord MANSFIELD's judgment puts the question beyond all doubt. If these propositions be correct and founded in law, it necessarily follows that the seisin under the settlement was not disturbed or divested; and, therefore, the powers of sale and exchange vested in the trustees were not affected by the fines: and if the fines levied by Lord and Lady Jersey did not disturb or divest the seisin, if they did no act inconsistent with the estate, if no forfeiture was incurred by them, it is scarcely possible to conceive how the power or right in Lord and Lady Jersey to require or direct a sale can be destroyed or suspended. But supposing that Lord and Lady Jersey did an act inconsistent with the estate, that they incurred a forfeiture, and that the fines levied by them displaced and divested the seisin; yet there is ground to contend that their power of requesting or directing will not be affected by any such acts. The power of requesting

and directing is not annexed to any estate given to them by the settlement, but is a personal confidence given to them as a check upon the trustees, to whom the power of sale is given, and for the convenience and advantage of all interested under the settlement. The intention of supporting and preserving this power, as well as all the other uses and trusts, is clearly and unequivocally expressed in the deed; and if it were not so, yet to presume the contrary, would be to presume that Lord and Lady Jersey meant to destroy a power which must be useful to their interests, but which cannot be exercised to prejudice them without their own concurrence. The universal and constant practice of conveyancers has been in favour of this view of the question; and in *Smith v. Doe dem. Lord Jersey*, in error, 2 Brod. & B. 473, the practice of conveyancers was much relied upon. Upon this ground, the plaintiffs are entitled to the judgment of the Court.

Coote, contra. As to the first point, it may be admitted, that the cases cited on the other side are sufficient to establish, that when the tenant for life joins with the immediate remainder-man in levying a fine, no forfeiture takes place; but those cases are not similar in their circumstances to the present. And in *Garrett v. Blizard*, 1 Roll. Abr. 855, which is the only case where there was, as here, an intermediate estate, the levying the fine was decided to be a forfeiture. That case was argued several times; and the Court took the distinction between a fine and a recovery, viz. that a fine cannot operate on parts of an estate, but on the whole fee. If so, it necessarily followed, that all the intermediate estates were divested and turned to a right. It is laid down in 3 Bac. Abr. 194, tit. Fine, and in *Hunt v. Bourne*, 1 Salk. 341, that a fine must convey a fee simple, unless the express acknowledgment of the parties qualify it. The parties, therefore, must put their intention on the record, or otherwise they will create for themselves a tortious fee. And this is necessary, to prevent the parties using this powerful assurance from turning it into a wrong. *Smith v. Clyfford*, and *Roper v. Halifax*, which have been cited on the other side, are both cases of a recovery. Now, a recovery may operate upon particular parts of the estate, but a fine cannot do so. The ground of the decision in *Smith v. Clyfford* was, that it was a question, whether it was a forfeiture within the statute of Elizabeth, which the Court held applied only to a bare tenant for life; and they thought it no forfeiture, inasmuch as the recovery had a legal subject to work upon, viz. the ultimate remainder in tail, and passed over the intermediate estates tail: but the operation of a fine is very different. In *Roper v. Halifax*, the tenant conveyed away the estate to trustees during the joint lives of herself and her husband, to secure 800*l.* a year pin-money; remainder to the use of her husband for life; remainder to herself for life, and other remainders over; leaving the reversion of her old estate in herself, in order to support the powers: and there the subsequent instrument was an innocent conveyance, and contained an express reservation of the powers. That case, therefore, has nothing to do with the present. The result of all the authorities proves, that the effect of this fine is to produce a forfeiture. But it is contended

by the other side, secondly, that its operation may be controlled by the agreement of the parties, for effecting any particular or special purpose. If that agreement appears in the concord of the fine, it is so, but not otherwise. Such an agreement may indeed be binding on the parties to the fine, but not, except in the case put, upon third parties; and, therefore, if it is not contained in the record, the remainder-man may enter for a forfeiture. No case has been or can be cited to which this observation will not be found to apply. Suppose tenant for life levies a fine, and declares the uses of it, but not on the record, having in fact the intention to gain a wrongful fee; if the remainder-man brings ejectment, and the deed declaring the uses were produced on the trial, and it should then appear that the fine came into use to operate only as a confirmation of the remainder-man's estate, would that be a defence? If so, the tenant for life might run no risk: he might declare the uses by a secret instrument, to be produced, if necessary, and if not, to be destroyed, as soon as it is too late for the remainder-man to enter; or he may execute two declarations, and produce, ultimately, whichever happens to be most advantageous to him. All this is prevented by holding that the agreement must be put on the record; and that, if on the record he makes a wrongful declaration of the uses of the fine, it will amount to a forfeiture of his estate. In *Puttenham v. Duncombe*, 2 Dyer, 157 b, the two instruments were dated on the same day; and of course, therefore, formed but one assurance. Besides, Puttenham was seised in fee, and no question of forfeiture was there raised; and there it was not a question with a third party, which makes all the difference. In *Cromwel's case*, Blunt being seised either in fee or in tail of the manor, conveyed it to Andrews, with a covenant to levy a fine, and with a condition of re-entry, if Andrews did not re-convey the advowson to Blunt; a fine was levied, sur grant and render; and Andrews having died without re-conveying, Blunt re-entered. There it was held, that the fine did not operate to prevent him, for the whole was one assurance; but there, the interest of third persons was not involved. The same answer may be given to *Perrot's case*, and *Anonymous*, Skin. 238. The other cases cited on this point are either cases arising under peculiar circumstances, and, with one exception, not cases of forfeiture, or cases where it has been held, that fines levied in execution of a power do not destroy it; and it is contended, that there is no difference between a fine in execution and in confirmation of a power. In the *Earl of Leicester's case* it is clear, that the Court might have held that the deed by which he covenanted to levy the fine to other uses was a revocation of the former use; besides, no forfeiture was then involved. In *Bullock v. Thorne* the fine was levied by the tenant in tail, and consequently, was not wrongful; besides, the case fell within 27 Eliz. c. 4, as to voluntary conveyances. The only part of the case applicable to the present is a dictum at the end, which was not necessary to the decision. The case of *Herring v. Brown* was decided first in the King's Bench, where it was held, that the power was destroyed by the fine subsequently levied. This decision was afterwards overruled in the Exchequer Chamber, by six Judges

to two; but one of the six decided on the ground, that, though the power was destroyed, yet the party claiming was barred, because his ancestor was conusee of the fine. That case, therefore, is no authority where the rights of third parties are introduced. The result is, then, that in the cases it is generally and broadly laid down, that a fine by tenant for life is a forfeiture, and that he cannot relieve himself from it by any agreement not introduced upon the record itself. But, thirdly, it has been argued, that the fines in this case were, and were declared to be, for further assurance, and in confirmation of the prior uses contained in the marriage-settlement, and that Lord and Lady Jersey were in a condition to give further assurance, and were bound so to do. If, indeed, the deeds executed, and the fines levied in 1806, to carry into effect the articles entered into before marriage, can be considered as one assurance with those of 1807, the argument is at an end. But that cannot be so; for the deeds and fines in 1806, together, make one complete and perfect assurance: and those in 1807 were for the very purpose of making alterations therein; and being so, they cannot form one assurance together. *Selwyn v. Selwyn*, 4 Burr. 1952, was the case of a recovery, and does not apply, unless it can be shown that there is not any difference between a fine and a recovery in this respect. It is argued, indeed, that *Lutwich v. Mitton*, which was the case of a fine, was overruled by it; but the two cases go on very different principles. In *Roe v. Griffiths and Others* the ground of the decision was, that the testator had the reversion in fee in him, which was not affected at all by his admission under the surrender to the uses contained in his marriage settlement. Neither this case, therefore, nor *Goodright v. Mead*, nor *Ferrers and Curson v. Fermor and Others*, are applicable to the present. But the case of *Doe v. Whitehead*, 9 Burr. 701, is a strong authority. There Lord MANSFIELD stated, that if you could distinguish the conveyance, and suppose Timothy Stoughton to have been only tenant for life, at the time of his levying the fine, it would be the forfeiture of his estate for life; and he afterwards, in deciding the case, says, "I look upon all this as one assurance. If they were distinct conveyances or assurances, this fine would be a forfeiture of his estate for life under the new settlement." This, therefore, is an authority to show that if the assurances are in this case distinct, the fine operates to produce a forfeiture. Now, how is it possible to consider the whole in this case as one assurance? Here, the first deed, after limiting the estate in a different manner, according as either Lord or Lady Jersey might happen to survive, contained a power of appointment by Lady Jersey, limited, however, to persons related to her by blood or consanguinity; but the second deeds give her an absolute power of appointment, without any such limit. They are, therefore, so far, at least, in discordance with the former, and cannot, independently of the interval of time and the other circumstances before alluded to, be considered as forming one assurance. If these general positions be allowed, it must follow that this power of Lord and Lady Jersey, to request and direct a sale, is at an end. It is a component part of the powers of sale and exchange; a power append-

ant, as relating to the life estates, and a power in gross, as relating to those in reversion. It was, therefore, extinguished by the operation of the fine. *King v. Melling*, 1 Ventr. 225, *Edwards v. Slater*, Hardr. 410, and *Digges's case*, 1 Co. 174, are authorities in point. As to the practice of conveyancers, which has been mentioned, it is not uniform in this respect, and is not any authority for the Court. It may be said, the construction contended for by the defendant is productive of hardship; but if parties will levy fines come ceo, in this manner, they must take the consequences, and must not leave others to ascertain, from secret conveyances, their intention. They have only to state their intention in the concord of the fine, and then no room for doubt will be left.

The following certificate was afterwards sent:

We have heard this case argued by counsel, and have considered it; and we are of opinion that the fines levied by the Earl and Countess of Jersey, in or as of Trinity term, 1807, did not operate to extinguish, destroy, or suspend the right or power of the Earl and Countess, and the survivor of them, to request and direct a sale or exchange of the settled estates under the powers for that purpose contained in their marriage settlement, so as to prevent an exercise of those powers by the trustees of the settlement.

C. ABBOTT,
J. BAYLEY,
J. S. HOLROYD.

JOHN HATFIELD v. JAMES THORP.—p. 589.

An estate in fee, upon the determination of a life estate, was devised to the wife of A. B.: A. B. was one of the attesting witnesses to the will. The testator died in 1779, and the wife of A. B. died in 1813, before the previous life estate was determined: *Held*, that A. B. was not a good attesting witness to this will.

THE following case was sent by the Master of the Rolls for the opinion of this Court:

John Steemson was, at the respective times of making his will and of his death, seized in fee simple of a freehold messuage, house, and garden, situate in Newark, in the county of Nottingham; and being so seized, made his last will in writing, bearing date the 18th of November, 1779, and thereby devised to his daughter, Mary Bell, "All that his messuage, house, and garden, at Newark aforesaid; and at his daughter Marv Bell's death, the messuage and appurtenances to his daughter Elizabeth Hatfield and her heirs, for ever." The said John Steemson signed and published his will in the presence of Ann Hill, Samuel Leonard and Thomas Hatfield, who respectively attested the same in his presence, and in the presence of each other. Thomas Hatfield

one of the attesting witnesses to the will, was, at the time of his attestation, the husband of the said Elizabeth Hatfield, the daughter of the testator. John Steemson died shortly after making his will, without having altered or revoked the same, leaving the said Mary Bell, Elizabeth Hatfield, and Thomas Hatfield, surviving him. Elizabeth Hatfield died on the 9th of April, 1813, in the lifetime of Mary Bell, without having done any act to dispose of the interest (if any) which she took under the will of John Steemson, leaving Thomas Hatfield, her husband, and the plaintiff, John Hatfield, her eldest son and heir-at-law, surviving her. Thomas Hatfield died in January, 1819, and Mary Bell on the 10th day of April, 1820. The question for the opinion of this Court was, whether the will of John Steemson was duly attested to pass any, and what estate, in the messuage, garden, and premises at Newark, to Elizabeth Hatfield.

Cockerill, for the plaintiff. Thomas Hatfield, the witness upon whose attestation this question arises, was a credible witness. within the meaning of the statute of frauds; and this will was therefore duly attested, so as to pass the real estate. There are conflicting authorities upon the question, whether the interest which renders the attesting witness to a will incompetent, is an interest at the time of the attestation, or at the time when his testimony is required. In *Holdfast on the demise of Anstey v. Dowling*, 2 Str. 1253, 19 G. 2, a person who took under a will an annuity charged upon the real estate devised, was held not to be a credible witness, within the meaning of the statute; and Lord Chief Justice LEE, in delivering the opinion of the Court, argued as if the objection of benefit from the will to the witness, at the time of subscribing, could not be removed or be taken off by any subsequent fact. In that case, however, the witness had an interest at the time of the trial. That decision occasioned the passing of the stat. 25 G. 2, c. 6, which, however, applies only to wills made after the 24th June, 1752. In *Wyndham v. Chetwynd*, 1 Burr. 414, 31 G. 2, a similar question arose: the testator, in that case, died in 1750, leaving a will (by which he charged his real estate with the payment of his debts and legacies), attested by his two attorneys and apothecary, he being indebted to each of them at the time of the attestation, for their professional services. Their several debts were paid before the day when the cause was tried, when their testimony was required to prove the will, and the Court of King's Bench were of opinion that the will was duly attested. So also in *Lord Aylesbury's case*, there cited, the testator had left legacies charged on his lands to three servants, who attested his will; they released the legacies before examination, and it was held that the will was duly attested. In *Baugh v. Holloway*, Peere Will. 557, Sir Robert Raymond, in argument, lays it down as a clear position, that if a legatee of money releases the legacy, he is a good witness to the will. In *Hindeson v. Kersey*, 4 Burn's Ecc. Law, 97, the testator, by a will made in 1734, devised his lands to trustees, to dispose of the rents and profits to poor orphans, and aged and impotent people, within a particular township. The will was attested by two of the trustees, who, at the time of attestation, and of the testa-

tor's death, were seised of tenements in the township, for which they paid the poor-rate. Before the day of trial, they released their interest to the other trustees, and conveyed their tenements within the township to other persons. The majority of the Court were of opinion, that the will was duly attested to pass the real estate; but Lord CAMDEN differed, and delivered an elaborate judgment in support of his opinion. The weight of authority, therefore, is in favour of the proposition, that a party having an interest at the time of attestation, but who discharges that interest previously to his examination, is to be considered a credible witness, within the meaning of the statute of frauds; and that being so, if Thomas Hatfield, the husband of Elizabeth Hatfield, had been now alive, and were called upon to prove the will, he would be a competent witness: for, in the events that have happened he derives no benefit whatever from the will; for his wife having died before the life estate of Mary Bell was determined, he was never seised in right of his wife; and she never having been seised in possession, he did not, upon her death, become tenant by the curtesy. But assuming that Thomas Hatfield took such benefit by this will as, before the stat. 25 G. 2, c. 6, would have rendered him an incompetent witness, and therefore, that before that statute, not only the devise to Elizabeth Hatfield but the whole will would have been void, that statute restores his competency and re-establishes the will. By the 1st section it is enacted, "That if any person shall attest the execution of any will, to whom any beneficial devise, legacy, interest, &c., of or affecting any real or personal estate, except charges on lands for payment of debts, shall be thereby given, such devise, &c., shall *so far only* as concerns such person attesting the execution of such will, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil." The clear intent of the statute was to restore the competency of the attesting witness in all cases of benefit arising to him under the will, and to avoid the will "*so far only*" as concerned the person attesting the execution, or any person claiming under him; and since that statute, therefore, no will can be void by reason of interest arising under it to the attesting witness, further than as to the interest of such witness, or any person claiming under him. This will, therefore, is well attested, and as the plaintiff does not claim under the attesting witness, he is entitled to an estate in fee simple in the lands in question.

Reader, contra. This will was not duly attested so as to pass the real estate, and, consequently, Elizabeth Hatfield took no estate in the devise to her, for Thomas Hatfield cannot be considered a credible witness within the meaning of the 29 Car. 2, c. 3. It is clear that he would not have been a competent witness to prove the will, during the lifetime of his wife, for he would have an interest in the right of his wife, in the estate which she took under the will; they might have sold their interest in the estate, and the money arising out of such sale would have belonged to the husband. Besides, if Mary Bell had died in the lifetime of Thomas and Elizabeth Hatfield, he would have been seised during the life of his wife, and in case of surviving her, he would

have been tenant by the curtesy ; he would therefore have an interest in supporting the will, and could not be a competent or credible witness to prove it. The case of *Hilyard v. Jennings*, Carthew, 514, is an authority to show that a devisee is not a good witness to a will under which he takes an interest. The decision in that case proceeded on the ground that the will was void, quoad the devise to him, because he took an interest under it, and *Holdfast dem. Anstey v. Dowsing*, 2 Str. 1253, is an authority precisely in point to show, that Thomas Hatfield was not a credible witness within the meaning of the statute. It is true that there are authorities to show, that the competency of a person interested at the time of the attestation may be restored by a lease, payment, or extinguishment of all his interest, so as to admit him to prove the execution. In this case, however, the husband had an interest in right of his wife, derived from the estate which she took under the will, and he could not release or extinguish that interest, for he could not destroy his wife's estate without her consent. As long as she lived, therefore, he would have an interest in the estate devised to his wife, incapable of being extinguished. The statute of the 25 Geo. 2, c. 6, s. 1, applies only to cases where the interest taken under the will is destroyed by the statute itself. It enacts, that the devise, legacy, estate, or interest, so far only as concerns such person attesting the execution of the will, shall be null and void. Here the attesting witness does not take any such beneficial interest under the will, as the statute renders null and void ; the husband, in fact, takes no estate or interest whatever under the will ; his wife, indeed, does take an estate under the will, and, by operation of law, he, in right of his wife, derives a beneficial interest from that estate. The estate of the wife is not destroyed by the statute, and, consequently, the derivative beneficial interest which the husband takes in that estate, in right of his wife only, is not extinguished. Then if this be not a case within the stat. 25 Geo. 2, c. 6, the husband had an interest, not only at the time of the attestation, but an interest continuing from the time of executing the will in 1779, till the death of his wife in 1813, during all which time he would not have been a competent or credible witness to prove the execution of the will. Independently of the question of interest it is a general rule also, that a husband and wife cannot in any case be a witness for each other. *Davis v. Dimwoody*, 4 T. R. 678.

Cockerill, in reply. The husband might have extinguished all his interest in the wife's estate, by releasing the rents and profits during his life, and he might, therefore, have made himself a competent witness to prove the will, immediately after the death of the testator.

The Court afterwards sent the following certificate:

This case has been argued before us ; and we are of opinion, that the will of the said John Steemson was not duly executed, so as to pass any real estate in the messuage, garden, and premises to Elizabeth Hatfield.

C. ABBOTT,
G. S. HOLROYD,
W. D. BEST.

REX v. WILLIAMS.—p. 595.

The Court will grant a criminal information for a libel upon a public body of men upon an affidavit, stating the publication of the libel by the defendant.

A RULE nisi had been obtained for filing a criminal information against the defendant for an alleged libel upon the clergy of the diocese of Durham. The publication stated that upon the death of her late majesty, none of the bells in the several churches at Durham were tolled. It ascribed this omission to the clergy, and then proceeded to make some very severe observations on that body. The rule was obtained upon affidavits, stating the purchase of the newspaper containing the libel, and that the defendant was the proprietor or publisher of the paper.

Browham and *Carter* now showed cause, and urged that the Court would not grant a criminal information for a public libel, upon the application of an unknown private prosecutor, and without any affidavit of the charge being untrue.

Scarlett and *Tindal, contra.* The Court have, in many instances, granted informations for libels, on a number of individuals, without requiring any affidavit of the falsehood of the charge. In *Michaelmas*, 13 Geo. 2, 1739, such an information was granted against M. Jenour, the printer of the *Daily Advertiser*, for publishing a libel against the Directors of the East India Company; and this application was supported by affidavits, stating the purchase of the newspaper, and an acknowledgment by the defendant that he had printed it. In *Hilary term*, 28 Geo. 2, 1755, a similar information was granted against A. Alderton, for writing and publishing a libel on the justices of the peace for the county of Suffolk, in an advertisement respecting the expenditure of money in the hands of the county treasurer. The only affidavit in support of the application was, that of the printer of the newspaper, that he had received the advertisement from the defendant for publication. So in *Hilary term*, 15 Geo. 3, such an information was granted against R. Holloway and G. Allen, for printing and publishing a libel upon the justices of the peace of the county of Middlesex, usually sitting by rotation in Litchfield Street, in a pamphlet entitled *The Rat-trap*, charging them with ignorance and corruption in the execution of their office. This rule was granted upon an affidavit, stating the purchase of the pamphlet from one of the defendants, and that the other acknowledged himself to be the author, and that several gentlemen named, usually sat, by rotation, as justices at a public office in Litchfield Street. It is clear, too, from *Rex v. Osborn*, 2 Barnadiston, 138, 166,* that the Court will grant a criminal information for a libel, reflecting on a public body.

Rule absolute.

* See this case also in a note in 2 Swanst. Rep. 503.

DIXON v. REED.—p. 597.

Where a ship and cargo was barratiously taken out of her course by the crew, and the ship and part of the cargo sold, and the remainder sent home by another vessel: *Held*, that this was a total loss of the cargo from the time of the committing of the act of barratry.

ACTION upon a policy of insurance on ship and cargo, at and from Sierra Leone to a port of discharge in Great Britain; 2000*l.* upon ship and 3000*l.* upon the cargo, valuing wood at 12*l.* per load. The plaintiff, on the trial of the cause, at the London sittings after last Michaelmas term, had obtained a verdict for a total loss by barratry, and the underwriters, upon a threat of execution, paid as for a total loss. A rule nisi had been obtained, calling on the plaintiff to show cause why the underwriters should not be allowed the amount at which that part of the cargo which arrived in London had been valued by the policy, subject to the charges thereon, together with the sums paid out of the proceeds of the ship and cargo at Barbadoes, for wages, &c., and why so much as the said two sums should amount to, should not be paid back by the assured to the underwriters, out of the money paid over to them, or why, in default thereof, the consolidation rule should not be opened and a further trial be had. The following facts now appeared upon the affidavits. The ship received on board, at Sierra Leone, 233 logs of timber, being about 260 loads, and sailed from thence on her voyage, on the 8th March, 1820, but was barratiously taken by the crew to Barbadoes, where she arrived on the 28th April, and the ship was condemned and sold, and 47 logs of timber were also sold, to pay the charges incurred there, and the remaining 186 logs were forwarded to London by another vessel, which arrived in August, 1820. The insured abandoned to the underwriters. Upon the arrival of the 186 logs in this country, the market price of timber being then 10*l.* or 11*l.* per load, the plaintiff proposed to settle the loss upon that part of the cargo at 69*l.* 9*s.* 6*d.* per cent. The underwriters not consenting to it at that time, the market price of timber afterwards fell, and the 186 logs were, on the 27th April, 1821, sold, (but not by the plaintiff,) at the rate of about 6*l.* per load; and the loss actually paid by the underwriters on the cargo amounted to 93*l.* 12*s.* 6*d.* per cent.

Scarlett and *F. Pollock* now showed cause. The question is, whether, upon the facts proved, this was to be considered a total loss, with benefit of salvage, or merely an average loss. If it was a loss of the latter description, the plaintiffs can only recover for the damage they have sustained by the loss of the 47 logs at Barbadoes. If, on the other hand, it be a total loss, with benefit of salvage, then the plaintiffs are entitled to recover the sum which the underwriters have actually paid. They were then stopped by the Court.

The Solicitor-General and *Puller*, contra. This was only an average loss. It is quite clear that if the ship had been driven out of her course by tempestuous weather to Barbadoes, and had been there condemned and sold, and a part of the cargo also sold, and the rest transhipped, and the voyage, as to the latter part, thereby retarded, that

would have been only an average and not a total loss. *Glennie v. London Assurance Company*, 2 M. & S. 371. *Anderson v. Wallis*, 2 M. & S. 240. *Hunt v. The Royal Exchange Assurance Company*, 5 M. & S. 47. In the latter case it was expressly held, that a loss of voyage for the season by the perils of the sea, was not a ground of abandonment upon a policy on goods, with a clause of warranty, free from average, where the cargo is in safety, and not of so perishable nature as to make the loss of the voyage a loss of the commodity. Now here, the commodity was not of a perishable nature; it was not deteriorated in value by any of the perils insured against, but merely by the fall of price, for which the underwriters are not liable. It can make no difference whether the ship be retarded in her voyage by the perils of the sea, or by the barratry of the master or mariners; the underwriter having expressly insured against this description of peril.

ABBOTT, C. J. I am of opinion, that this is a case of a total loss, with benefit of salvage. The case is plainly distinguishable from all the cases which have been cited in argument, where the ship has been driven out of her course by the perils of the sea, and the voyage thereby retarded. In those cases, the cargo was, during the whole time, in the possession of the assured; here, by the fraud and barratry of the master and marines, the cargo was taken out of the possession of the assured. From that time it became to them a total loss. The payment of the wages at Barbadoes, and the sending home the 186 logs, were no acts of the assured, or of any person authorized by them. I think, therefore, that this was a total and not an average loss, and consequently this rule must be discharged.

Rule discharged.*

* See *Falkner v. Richie*, 2 M. & S. 290, as to an insurance on ship.

DYSON and Another v. COLLICK.—p. 600.

The contractors for making a navigable canal, having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close, across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain a trespass against a wrong doer.

TRESPASS for breaking and entering part of a cut or water-course, belonging to the plaintiffs, in the county of Sussex, and breaking down a dam of the plaintiffs, then being in and across the said part of the said cut or water-course belonging to the plaintiffs, which cut or water-course led from the Lavant through closes of meadow-land near to a certain cut or branch of a canal, which the plaintiffs were then making, under a contract made by them with the company of proprietors of the Portsmouth and Arundel Navigation, by virtue of an act of the 57 G. 3, for making a navigable canal from the river Arun unto Chichester harbour, and from thence to Langstone and Portsmouth harbours, with a cut or branch from Hunston common to the city of Chichester; by means of which said breaking down the said dam, the water rushed and

flowed with great force from the river Lavant unto the said cut or water-course, and the said closes of meadow-land into the said cut or branch, so making or nearly completed, and forced a great quantity of the said closes or meadow-land into the said cut or branch, and broke down thirty yards of the said cut or branch, and filled up the same, which said quantity of soil, so forced into the said cut or branch, the plaintiffs, under their contract, were bound to remove. Plea, not guilty. At the trial, before Wood, B., at the last assizes for the county of Sussex the only question of law, was, whether the plaintiffs had such an interest in the bank in question as to entitle them to maintain trespass. It appears that the plaintiffs had entered into a contract with the company of proprietors of the Portsmouth and Arundel navigation for forming a canal; and, in the course of performing their contract, in making the branch from Hunston common, in February, 1821, had erected a dam upon the locus in quo, by permission of the owner of the soil. The dam was six feet thick, and was twelve feet across, and was formed of earth and wooden piles. It had been originally made in January, 1821; between that time and December it had been repaired by the plaintiffs. A verdict having been found for the plaintiffs,

Taddy, Serjt., now moved for a rule nisi to enter a nonsuit, or for a new trial, and contended, that the plaintiffs had no such interest as to enable them to maintain trespass. They had constructed the dam on the soil of another, and by his permission; it was a continuation of the soil from one bank of the watercourse to another; it consisted of earth which coalesced with the adjacent soil; and the bank, therefore, became the property of the owner of the adjoining land. In *Callis on Sewers*, p. 74, fourth edition, it is laid down that "A wall doth differ in point of ownership from a bank, first, in respect of the materials the same is made of: for a bank is made *ex solo et fundo quæ ex suis propriis naturis sunt eadem cum terra super quæ edificatur*; but so is not a wall, for it is an artificial edifice, not of the materials arising of the place where it standeth, but which he brought thither, and built there *ad propria onera et costagia partis*: so that the ownership and property of a wall doth appertain to him who is bound to repair the same, though his ground lie not next thereto; but of a bank, the property and ownership is his whose grounds adjoin thereto." And this was considered good law by the Court of Common Pleas in *The Duke of Newcastle v. Clarke*, 2 B. Moore, 666, where it was held that the commissioners of sewers could not maintain an action against commissioners of a harbour for breaking down a dam erected by the former, and such commissioners, across a navigable river, as the authority to be exercised by them, on behalf of the public, does not vest in them such a property, or possessory interest, as will enable them to maintain such action.

Per Curiam. The dam was erected by the plaintiffs at their own expense, and with their own materials, upon the locus in quo, with the consent of the owner of the soil, for a special purpose. Until that purpose was completed, the plaintiffs were entitled to the possession of the dam. Now, it is perfectly clear that the person in possession of property, whether rightfully or wrongfully, may maintain trespass against a mere wrong-doer. Indeed, if they had any other than a partial or

subordinate interest in the dam, trespass is the only proper remedy. This case is distinguishable from that of *The Duke of Newcastle v Clarke*, for there the commissioners of sewers had no possession, but had a mere right to enter upon the locus in quo, and to do certain acts. In *Welch v. Nash*, 8 East, 394, the posts were put upon the lands of another without his permission; and yet it was held, that the party who put them there might recover in trespass for taking them away, where the general issue only was pleaded. Now, that could be only on the ground that the posts were the property of the plaintiff; for if they were not so, it would have been a good defence to the action.

Rule refused.

PATRIDGE v. BERE.—p. 604.

A mortgagor in possession of the premises mortgaged, is tenant to the mortgagee.

ACTION for diverting a water-course. The declaration contained an averment, that a certain close was in the possession and occupation of one John Turner, as tenant thereof to the plaintiff, the reversion belonging to the plaintiff. At the trial before PARK, J., at the last assizes for the county of Devon, it appeared, that Turner being tenant for life of the close mentioned in the declaration, in March, 1817, had mortgaged the same to the plaintiff for 100*l.*, for a term of years, provided he, Turner, lived so long, and that Turner had since that time continued in possession, and paid the interest. It was objected on the part of the defendant, that the relation of landlord and tenant did not subsist between a mortgagor and mortgagee, and consequently, that the averment was not supported by evidence; the learned Judge overruled the objection. And now,

Adam moved for a new trial, and contended, that there was no tenancy, there was no payment of rent, but of interest; and he relied on the opinion of BULLER, J., in *Birch v. Wright*, 1 Term. Rep. 382.

Per Curiam. Here the mortgagor was in actual possession of the mortgaged premises, by sufferance of the mortgagee, who has the legal title vested in him. The former, therefore, is a tenant within the strictest definition of that word.

Rule refused.*

* As long as the mortgagor or his heir is in possession of the land, and the legal ownership is in the mortgagee, there must subsist a tenancy between the parties; or otherwise the mortgagor or his heir must hold in fee, and as disseisors; for the law of England recognizes no possession independent of a tenancy, either to the lord paramount or meane lord. If, in the mortgage deed there is the usual proviso for the enjoyment of the land by the mortgagor and his heir until default in payment, &c., and the mortgagor is in actual possession, he may, under the agreement, be regarded as *tenant for years* to the mortgagee, during the continuance of the agreement; *Powlety v. Blackman*, Cro. Jac. 659; and on his death, during the agreement, his legal interest devolves on his *executors*, who, during the remainder of the agreement are trustees for the heir of the mortgagor. If, in the case of such agreement, the money is not paid at the appointed time, and the mortgagor continues in possession after the determination of the agreement, without any fresh agreement between the parties, he is, until payment of interest, or other recognition of tenancy, tenant by sufferance, for he came in by a rightful title, although he holds over wrongfully. If the mortgage deed

LAMPON the Younger v. CORKE.—p. 606.

A deed containing a general release of all debts, &c., recited that the releasee had previously agreed to pay to the releasor the sum of 40*l.* for the possession of certain premises, and that in "consideration of the said sum of 40*l.* being now so paid as herein before is mentioned," and also in consideration of the sum of 10*s.* a-piece, well and truly paid to the said releasor and J. S., the receipt of which said several sums of money they did thereby acknowledge, did release, &c. There was also a receipt for the sum of 40*l.* endorsed on the release. But it appeared on action afterwards brought for this sum that, in fact, it had never been paid: *Held*, that this deed of release was no estoppel, inasmuch as the general words of release were qualified by the recital, which stated only an agreement to pay, and not an actual payment of the sum of 40*l.*

ASSUMPSIT against the defendant, as the maker of the following promissory note, dated Edenbridge, April 11th, 1821, "Two months after date I promise to pay Mr. Thomas Lampon, junior, or order, the sum of 40*l.*, value received this day, in things appraised by Mr. Doubell, and in having possession given to me of the premises lately held under me by Thomas Lampon, senior, afterwards by the sheriff." The declaration contained, also, counts for goods sold and delivered, and the usual money counts. Plea, general issue. At the trial, at the last London sittings, before ABBOTT, C. J., it appeared, that the defendant was the landlord of certain premises occupied by the plaintiff's father, and that the plaintiff having taken possession of the premises, and the crops growing thereon, under a writ of execution against his father, the defendant, in order to get possession of the premises and crops, gave the note in question, which, when originally signed by him, did not contain the words "or order." These words were inserted on the 14th April, 1821, without his knowledge. Under these circumstances, the Lord Chief Justice thought the count on the note could not be sustained, and the plaintiff then proceeded on the other counts in the declaration. The defendant, in answer to the plaintiff's case, put in a deed, executed by the plaintiff, dated 14th April, 1821,

contains no such agreement, and the mortgagor remains the actual occupant with the consent of the mortgagee, he is strictly tenant at will. *Keech v. Hall*, 1 Doug. 22. If, in the latter instance, the mortgage is transferred to another, without the concurrence of the mortgagor, the tenancy at will is determined, and the mortgagor becomes tenant, by sufferance, to the assignee, until payment of interest or other recognition of tenancy; and in all cases in which the mortgagor can be considered tenant at will, the death either of himself or of the mortgagee must determine the tenancy. If it is determined by the death of the latter, the mortgagor will be tenant, by sufferance, to the representative of the mortgagee, until payment of interest or other recognition of tenancy, and afterwards tenant at will. If it is determined by the death of the mortgagor, and his heir or devisee enter and hold without any recognition of the mortgagee's title by payment of interest or other act, an adverse possession may be considered to take place. Per Holt in *Smartle v. Williams*, 3 Lev. 387, & 1 Salk. 245; *Thunder v. Belcher*, 3 East, 449. In every case in which a tenancy by sufferance exists between the parties, and even where an adverse possession commences, as by the entry of the heir or devisee of the mortgagor without the consent of the mortgagee, the payment of interest is a recognition of the title of the mortgagee, and evidence of an agreement that the mortgagor, or person deriving title from him, shall hold at will, and a strict tenancy at will commences. *Holland v. Hatton*, Carth. 414, & 10 Vin. Ab. 418, pl. 19. If the land is in the occupation of tenants, and the mortgagor is permitted to receive the rents, he has been considered to be a receiver for the mortgagee. *Moss v. Gallimore*, 1 Doug. 283; Vide Ex parte Wilson, 2 Ves. & Bea. 252, but without liability to account; Coote's Law of Mortgages, p. 327-8.

which recited that Thomas Lampon the elder, was in possession of certain hereditaments and premises, as tenant to the defendant, but which tenancy would have expired on the 29th day of September, 1821, had it not been otherwise determined; and that the plaintiff had recovered a judgment against the said Thomas Lampon the elder, for the sum of 450*l.*, besides costs of suit; and thereupon all the estate, term, and interest of the said Thomas Lampon the elder, of and in the said hereditaments and premises, together with the crops growing thereon, were taken in execution, by virtue of a writ of fieri facias, and the warrant grounded thereon, at the suit of the plaintiff; and that the defendant, being desirous of obtaining possession of the premises applied to, and prevailed on, the plaintiff, as such judgment-creditor, to give him possession of the same, which the plaintiff accordingly did, on the 11th day of April, instant, *he, the said defendant, having then agreed to pay unto the plaintiff the sum of 40*l.* for such possession*; and that the defendant had requested the said Thomas Lampon the elder and the plaintiff, to execute an assignment of all their estate, title, and interest in the said hereditaments, which they had agreed to do; and then proceeded to state, that, in pursuance of such agreement, *"and in consideration of the said sum of 40*l.* being now so paid to the plaintiff, as hereinbefore is mentioned*; and also, in consideration of the sum of 10*s.* a-piece to the said Thomas Lampon the elder and the plaintiff, in hand well and truly paid by the defendant, immediately before the execution of those presents; the receipts of which said several sums of money they did severally and respectively acknowledge: and from the same sums respectively and every part thereof, did thereby severally and respectively release the defendant, his heirs, &c., the plaintiff bargained, sold, &c.; and Thomas Lampon the elder bargained, sold, ratified, and confirmed unto the defendant, his heirs, &c., all the messuages or tenements, &c.; and it was further stated, that for the considerations thereinbefore mentioned, and also of the sum of 10*s.* to the plaintiff, in hand paid by the defendant, immediately before the execution of those presents, the receipt whereof was thereby acknowledged, he the plaintiff, generally released the defendant, his heirs, &c., from all dues, sums, claims and demands whatsoever, both at law and in equity. There was also endorsed on the deed a receipt by the plaintiff for the sum of 40*l.*, dated April 14th, 1821. The Lord Chief Justice thought this deed not a sufficient answer to the plaintiff's case, it being clearly proved and admitted, that, in fact, the sum of 40*l.* above mentioned had never been actually paid. The plaintiff accordingly had a verdict. And now,

Puller, by leave of the Lord Chief Justice, moved to enter a nonsuit. Here the release was a complete answer to the plaintiff's demand, and he cannot be allowed, after an admission, by deed, of the fact of payment of the 40*l.* to prove by parol evidence, that it had not been so paid. *Rowntree v. Jacob*, 2 Taunt. 144, Co. Litt. 512. The plaintiff's remedy, if he has any, is in equity; but at law the release is a good defence; for he has, in terms, distinctly admitted the receipt of the 40*l.*

ABBOTT, C. J. It appears to me, that in this case the release does not operate to prevent the plaintiff from recovering. The deed is.

indeed, inaccurately worded; but the Court ought to give such an effect to it as may best consist with what appears to have been the manifest intention of the parties, and what may best conduce to the real justice of the case. In the recital it speaks, in the first place, of an agreement to pay, and not of the actual payment of the sum of 40*l*. And then the consideration for the release is stated in these words: "In consideration of the said sum of 40*l*. being now so paid to the said Thomas Lampon the younger, as hereinbefore is mentioned." These latter words show, that the parties meant to refer to the former part of the deed, where it speaks of an agreement to pay this sum; and that we ought to read the whole sentence thus: "In consideration of the said sum of 40*l*. being now so agreed to be paid as aforesaid." If that were not so, this absurdity would follow; that the deed would recite an agreement to release in consideration of the payment of 40*l*.; and then would proceed to release the defendant from the payment of that very sum itself. We have been pressed with the difficulty arising out of the words immediately following; "the receipt of which said several sums of money they, the said Lampon the elder and plaintiff, admit, &c." But these may and do refer, most properly, to the payment of 10*s*. a-piece to those persons mentioned immediately before. And by so construing the deed, the whole becomes intelligible, and consistent with the justice of the case, and the obvious intention of the parties. I think, therefore, that the operation of this deed was not to release this sum, inasmuch as the release, though in general terms, must be controlled by the previous recital. The verdict is, therefore, right.

BAYLEY, J. The true question is, whether there is any thing in this deed which clearly shows, that this sum of 40*l*. has been paid to the plaintiff, and that not by a security, but in money. It must necessarily be admitted, that this release would have been an answer equally to the action on the note, if the note had remained unaltered. Then, are the words so clear as to leave no doubt? It first recites that the 40*l*. had been agreed to be paid. The recital does not go on to say, in addition to this, that the 40*l*. had been paid; but when we come to the operative part, we find it stated, that "in consideration of the sum of 40*l*. being now so paid, as hereinbefore is mentioned," &c. Now, the words "so paid," and "as hereinbefore is mentioned," obviously do not refer to a new payment, but to some former payment, mentioned in the deed. Then, if we look back, we find no actual payment there stated, but only an agreement to pay. The words of the deed, therefore, are ambiguous; and lead us to inquire, whether there was an actual payment or not. And, on the facts stated, there is no doubt as to that point. The Court is not, therefore, prevented from deciding according to what appears plainly the justice of the case; for although the note, as a security, is invalid, yet the debt for which it was given, not being paid, remains still due to the plaintiff.

HOLROYD, J. The plaintiff is entitled to our judgment, unless he is estopped, either by the deed of release or by the receipt endorsed on it. As to the latter, it is sufficient to observe, that, not being under seal, it cannot amount to an estoppel: but can only be evidence for the jury, capable of being rebutted by the other circumstances in the case.

And, if so, then, as it is admitted that no such payment has actually been made, this receipt becomes of no importance. As to the deed, it seems to me to depend on the construction to be given to the words already referred to, "In consideration of the said sum of 40*l.* being now so paid, as hereinbefore is mentioned." If the deed had absolutely stated a payment, unaccompanied by such words of reference, the case would be very different. But here, there are words of reference; and we must, therefore, look to the prior part of the deed, and there we find no statement of actual payment, but only of an agreement to pay. It seems to me, therefore, that this does not amount to an estoppel, so as to shut out the plaintiff from proof of the truth of the transaction. Estoppels are odious in the law, and, being so, they ought not to be allowed, unless they are very plainly and clearly made out. That is not the case in this deed; and, therefore, I think, it is no estoppel; and then the verdict is right.

BEST, J. If a party give a general release, it will, undoubtedly, extend to all debts then due: and the passages cited from Co. Litt. is to that effect. But that must be understood of a release without any previous recital, qualifying its operation. If there be introductory matter, that will qualify the general words of the release. That is the case here. It is quite clear, looking at the recital, what was the intention of these parties. The words, "as hereinbefore is mentioned" show that the parties referred to the previous part, where an agreement to pay is stated. In *Rowntree v. Jacob*, the debt was, in general terms, admitted to have been paid. But that is not so here, there being words of reference annexed. As to the receipt endorsed, that stands on a different ground; for not being under seal, it is no estoppel, and its truth may be disputed. This rule must, therefore, be refused.

Rule refused.

The KING v. BISHOP, Esq.—p. 612.

Where the facts tending to criminate a magistrate took place twelve months before the application to the Court, they refused to grant a criminal information, although the prosecutor, in order to excuse the delay, stated that the facts had not come to his knowledge, till very shortly previous to the application.

Scarlett had obtained a rule nisi in last Michaelmas term, for a criminal information against the defendant, for corrupt practices, as a justice of the peace. The latest circumstances alleged in the affidavits for the prosecution, took place in 1820. But in order to account for the delay, the prosecutor swore that he had no knowledge of the facts till shortly before the application, when there having been a meeting of magistrates on the 17th November last, for the purpose of investigating the defendant's conduct, he and another magistrate not being satisfied with the defendant's explanation, instituted the present inquiry.

Campbell and *Oldnall Russell* showed cause, and objected, first, that the application was too late. And they referred to *Rex v. Marshall*,

18 East, 322, and *Rex v. Harries*, 18 East, 270, where it was so held. If the want of knowledge will afford an excuse, a wide door will be open, for it will be in all cases easy to find some one in that situation who will prosecute.

Scarlett and *Taunton*, *contra*, relied on the investigation on the 17th November last, as taking the case out of the usual rule.

ABBOTT, C. J. We do not by discharging this rule, shut the door to an inquiry, for a bill of indictment may still be preferred against the defendant. But if we were to admit this excuse, we should entirely frustrate the very useful rule to which we have been referred. Perhaps, if at the investigation all the magistrates present had concurred in directing such an application to be made, the case might be different; but that does not appear to be the case. The rule must be discharged.

The Court upon this objection, having refused to discharge the rule, with costs, *Campbell* waived the objection and went into the merits.

Rule discharged, with costs.

GARBUTT and Another v. WATSON.—p. 613.

Where there was a verbal contract by the plaintiffs, who were millers, for the sale of a quantity of flour, which, at the time, was not prepared, and in a state capable of immediate delivery: *Held*, that this was a contract for the sale of goods within 29 Car. 2, c. 4, s. 17.

ASSUMPSIT for the non-performance by the defendant of a special agreement, relating to the sale of 100 sacks of flour. Plea, general issue. At the trial at the last assizes for the county of York, before BAYLEY, J., it appeared that the plaintiffs, who were millers near Hull, on the 22d October, 1821, made an agreement with the defendant, a corn-merchant, for the sale of 100 sacks of flour, at 50s. per sack, to be got ready by the plaintiffs, to ship to the defendant's order free on board at Hull, within three weeks, to be paid for by a bill on London at two months' date, on receipt of invoice. There was no memorandum in writing of the contract, nor any earnest paid. The flour at the time of the bargain was not prepared, so as to be capable of being immediately delivered to the defendant. The learned Judge at the trial was of opinion, that the case fell within the 17th section of the statute of frauds, and the plaintiffs were accordingly non-suited. And now,

Scarlett, by leave, moved to enter a verdict for the plaintiff. This case falls within the authority of *Towers v. Osborne*, 1 Str. 506, *Clayton v. Andrews*, 4 Burr. 2101, and *Groves v. Buck*, 8 M. & S. 179. In all these cases the Court held, that where the goods were not capable of immediate delivery, the sale did not fall within the statute of frauds. *Rondeau v. Wyatt*, 2 H. Bl. 68, is distinguishable, for there the flour was fully prepared, but here it only existed in the shape of unground wheat, at the time of the sale.

ABBOTT, C. J. In *Towers v. Osborne*, the chariot which was ordered to be made, would never but for that order have had any existence. But here, the plaintiffs were proceeding to grind the flour for the purposes of general sale, and sold this quantity to the defendant as part of their general stock. The distinction indeed, is somewhat nice, but the case of *Towers v. Osborne* is an extreme case, and ought not to be carried further. I think this case was rightly decided, the contract being one for the sale of goods, and falling within the 17th section of the statute of frauds.

BAYLEY, J. The nearest case to this is *Clayton v. Andrews*. But that decision was, as it seems to me, corrected by *Rondeau v. Wyatt*. This was substantially a contract for the sale of flour, and it seems to me immaterial, whether the flour was at the time ground or not. The question is, whether this was a contract for goods, or for work and labour and materials found. I think it was the former, and if so, it falls with the statute of frauds.

HOLROYD, J. I am of the same opinion. I cannot agree with the judgment of the Court in *Clayton v. Andrews*. This was a contract for the sale of goods, and therefore the verdict was right.

BEST, J., concurred.

Rule refused.

CARTWRIGHT, Esq. v. WRIGHT.—p. 315.

Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of a third person speaking of the plaintiff's conduct, and the declaration in setting it out had omitted those references: *Held*, that those omissions altered the sense of the remainder, and that the variance was fatal.

ACTION on the case for a libel. Plea, general issue. At the trial at the Westminster sittings after last Hilary term, before ABBOTT, C. J., the libel given in evidence was contained in a book published respecting Mr. Cobbett by the defendant, called "The Book of Wonders," and was as follows: Many well-intentioned persons have expressed their surprise, that the "Enlightener" should have been willing to accept of a seat in corruption's den, purchased with the bank notes of a man, whose "incapability and baseness" he had so powerfully exposed. To convince such persons, that this line of conduct was strictly patriotic, we have only to assure them, that in so doing, he was walking in the footsteps of that "Venerable Veteran," whose "Creed is the criterion of excellence, (see No. 195,) and who, in an article of that creed, has laid it down as a maxim, that "we must, in fighting the enemy, not reject the use of even despicable and detestable men," Cobbett, v. 32, p. 82. The libel as set forth in the declaration, omitted the words ("see No. 195,") and the words "Cobbett, v. 32, p. 82." The Lord Chief Justice was of opinion, that this was a fatal variance, and the plaintiff was nonsuited. And now,

Denman moved for a new trial. The omission does not alter the sense, for the defendant asserts the libellous matter respecting the plaintiff; and the references do not alter that: they only show that the defendant in speaking of the plaintiff, has adopted the language of another person. If so, *Tabart v. Tipper*, 1 Camp. N. P. C. 353, is an authority to show that the omission of that which does not alter the sense of the remainder is not fatal. He also referred to *Bell v. Byrne*, 18 East, 554.

ABBOTT, C. J. I thought at the trial, and I am still of the same opinion, that this was a fatal variance, inasmuch as the meaning of the paragraph given in evidence materially differs from that set out in the declaration. Reading the declaration, I should understand the libel as meaning, that the defendant had himself made the assertions there stated respecting the plaintiff. But when the libel itself is produced, and I find from the reference there contained, that it is a paragraph intended to expose the conduct, not of the plaintiff, but of Mr. Cobbett, it then turns out, that in truth, these assertions are made respecting the plaintiff, not by the defendant, but by Mr. Cobbett. The meaning, therefore, of the two paragraphs is different, and the nonsuit is right.

BAYLEY, J. The case of *Tabart v. Tipper*, establishes that a mere omission in setting out part of a libel is not fatal, unless the sense of that which is set out is thereby varied. Here there are two omissions, and the sense is thereby altered. For that which appears by the declaration to be the defendant's observation, turns out when the omissions are supplied to be the assertion of Mr. Cobbett, respecting the plaintiff, and that according to *Bell v. Byrne*, is a fatal variance.

HOLROYD, J., concurred.

Rule refused.*

* Best, J., was absent at Chambers.

FREEMAN and Another v. The EAST INDIA Company.—p. 617.

The captain of a ship has no authority to sell the cargo, except in cases of absolute necessity; and therefore, wherein the course of a voyage from India, the ship was wrecked off the Cape of Good Hope; and some indigo, which was part of the cargo, was saved, and the same was there sold by public auction, by the authority of the captain, acting *bonâ fide*, according to the best of his judgment, for the benefit of all persons concerned; but the jury found that there was no absolute necessity for the sale: *Held*, that the purchaser at such sale acquired no title, and the indigo having been sent to this country, the original owners were held entitled to recover its value.

TROVER, for forty-two chests of indigo. Plea, a general issue. At the trial, before ABBOTT, C. J., at the sittings after last Hilary term, the following appeared to be the facts of the case: The goods in question, which were the property of the plaintiffs, were shipped at Calcutta, on board the *Cerberus*, for England: the vessel was wrecked off the Cape

of Good Hope, and the greater part of the cargo was lost; 252 chests of indigo, however, were saved, and it did not appear that any of them were materially damaged. The forty-two chests, which were the subject of the present action, were perfectly sound when they arrived in England. The indigo was sold by public auction at the Cape of Good Hope, being advertised as part of the cargo of the *Cerberus*, by order of the captain, who acted *bonâ fide* according to the best of his judgment, and with a view to the benefit of all parties concerned. The vendees afterwards shipped the same to England, and they were deposited in the warehouses of the East India Company. The action was brought to try the right to the property, the purchasers having indemnified the present defendants. The Lord Chief Justice was of opinion, that the captain of a ship was not justified in selling any part of his cargo, except in case of absolute necessity; and he left it to the jury to say, whether, under the circumstances, there was such a necessity. A verdict having been found for the plaintiffs,

The Solicitor-General now moved for a new trial, and contended, first, that the captain, under the circumstances, had authority to sell the cargo; and, secondly, that the sale having been in market overt, the property was thereby transferred to the vendee. It must be admitted that, though the captain is not the agent of the owners of the cargo, and he is to be considered, as to them, a mere depository and common carrier; yet, under special circumstances, the character of agent and supercargo is forced upon him by the general policy of the law. The law is so laid down by Lord STOWELL in the case of the *Gratitudine*, 3 Rob. Adm. Rep. 258. That learned Judge there states that, "in some cases, the captain must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, and in intermediate ports into which he may be compelled to enter;" and then he mentions, as instances in the prosecution of the voyage, the case of throwing parts of the cargo overboard at sea, and of ransom by the general maritime law; and afterwards he puts an instance, in which the master, while in an intermediate port, has the same authority forced upon him. The case put is that of a ship driven into port with a perishable cargo, where the master can hold no correspondence with the proprietor, and the vessel is unable to proceed, or requires repairs to enable her to proceed in time. The learned Judge says, "In such emergencies the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law that the cargo should be left to perish without care. What must be done? He must, in such case, exercise his judgment, whether it would be better to tranship the cargo, if he has the means, or to sell it. It is admitted in argument, that he is not absolutely bound to tranship; he may not have the means of transshipment; but even if he has, he may act for the best in deciding to sell; if he acts unwisely in that decision, still the *foreign purchaser will be safe under his acts*: if he had not the means of transshipping, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish." Now, in this case, the ship was totally lost. It

appeared at the trial, that, at the time when the sale took place, there was no other vessel at the Cape of Good Hope, in which that part of the cargo which was saved could be transmitted to England. It is true, that vessels in their way to England were expected, and arrived within a few weeks. At all events, it was for the captain to exercise his judgment, bona fide, whether it was better to tranship or to sell. It is admitted that he did in this case act honestly, and, according to the law as laid down by Lord STOWELL, a foreign purchaser has a good title to the property. In the case of *Reid v. Darby*, 10 East, 148, the Court of K. B. were of opinion, that the captain has no right to sell a ship reported, upon survey, not to be seaworthy, if he could have repaired it, and continued the voyage. Indeed, if a captain is not at liberty, under any circumstances, to sell the cargo, it will be impossible to find purchasers for cargoes in case of wreck. How can the purchaser learn whether the captain has any special authority to sell the cargo? The true question, therefore, which should have been left to the jury, was, whether, in this case, the captain had acted bona fide according to the best of his judgment, in making the sale. But, secondly, this was a sale in market overt; and by the law of Holland, which prevails at the Cape of Good Hope, such a sale transfers the property to a vendee; and for this he cited Van Leeuwen's Commentaries on the Roman Dutch Law, p. 400.

ABBOTT, C. J. The case of the *Gratitudine*, which has been cited, was one where there was an hypothecation of the cargo by the master, for the purpose of enabling the ship to go on with her voyage. But here the case was quite different, for the vessel having been wrecked, the object of the voyage was entirely at an end; and, under these circumstances, a sale of the cargo, or any part of it, by the master, could confer no title on the purchaser, unless there was an apparent necessity for such sale. That question I left to the jury, and they were clearly of opinion, that there was, in this case, no such apparent necessity. I also told them, that if the master was not authorized to sell, the purchaser would not acquire any title, unless by a sale in market overt, and then only where he was not acquainted with the circumstances under which the sale was made; but upon the evidence in this case, it appeared that he was fully acquainted with them. If I was wrong in so leaving the case to the jury, there ought to be a rule granted. But I am still of the same opinion.

BAYLEY, J. I think the case was properly left to the jury, and that there ought to be no rule granted. The case depends on the extent of the authority which the master has over the cargo. It is a question of considerable importance, but, as it seems to me, not of any great difficulty. The master has a clear right, by the general marine law, to hypothecate either ship or cargo, for the purpose of continuing the voyage, but beyond that, he has no power, except in a case of absolute necessity. There may be, indeed, cases in which hypothecation would be useless and absurd. Suppose the ship were wrecked, and her materials alone were saved; or that the cargo was saved, being perishable, and there were no means of transhipment; in such cases, an absolute

necessity for sale would exist, and thereby the master would be forced to become the agent of the owners, for the purposes of sale; but otherwise, he would only possess the right of hypothecation. The rule laid down by HOLT, C. J., in *Johnson v. Shippen*, 2 Ld. Raym, 914, is this, that the master has no authority to sell any part of the ship, and that his sale transferred no property, but that he might hypothecate; and this is cited and relied upon by Lord Ellenborough in *Reid v. Darby*, 10 East, 157. The case of absolute necessity constitutes the only exception to this general rule. Here there was no such necessity existing, and the sale, therefore, transferred no property to the defendant. As to this being a sale in market overt, it can make no difference; for as the purchaser knew the circumstances under which the sale took place, he must be considered to have bought at his peril, and to be liable, in case that it ultimately turned out that no necessity existed, to have the sale vacated. Here, too, the indigo was bought, not for consumption at the Cape of Good Hope, but to be sent forward to the place of its original destination. As to the hardships on the defendant, it does not exist, for he is clearly entitled to recover from the master the price paid by him for the indigo. This rule must, therefore, be refused.

HOLROYD, J. I am of the same opinion. It is clear that there was no necessity for the sale of this indigo, and that that must have been known to the purchaser. In order to justify the master in acting as the owner's agent, in transferring the property, there must be an absolute necessity for the sale; and if a party purchase, he does so at his peril. The mere possession of goods was never held sufficient, unless accompanied by an authority to sell, express or implied; and the maxim of caveat emptor applies to such cases. The only circumstances under which the master has been held to have such an authority, are where there is an absolute necessity for it, as in the case of a wreck, without power of transhipment, or where it becomes necessary to sell part of the cargo, for the purpose of enabling him to prosecute the voyage.

BEST, J. A carrier by sea and a carrier by land stand precisely in the same relation to the owner of the goods that are to be carried. Their duty is, to convey the goods to the place of their destination, and their authority, with respect to the goods, is such only as is necessary for the performance of this duty. In a sea-voyage difficulties often occur, from which journeys by land are exempt. The authority of the master of a vessel must increase in proportion to the difficulties that he has to encounter. If a storm or an accident disables the ship from proceeding on her voyage, and the master finds himself in a country where money can only be procured to pay for her repairs, by sale of part of the cargo, the necessity of his crew, as Lord Stowell has expressed it in the *Gratitudine*, forces upon him an authority to sell. So, if the ship be incapable of repair in a foreign port, and the cargo be perishable, or no place can be got to secure it in, although the voyage be at an end, it would be better for the owner of the cargo, that it should be sold than left to perish, and the master might in such case sell the whole. The purchaser, knowing that necessity alone can justify the sale, and give him a title to what he purchases, will assure him-

self that there is a real necessity for the sale, before he makes the purchase: and caution on his part will prevent (what has too frequently happened) the fraudulent sales of ships and cargoes in foreign ports. One of the principal objections to foreign commerce is, that the property of most engaged in it is not within their personal control, and often not within the protection of English courts of justice. The conduct of all who buy or sell such property in the absence of the owner, should be watched with great jealousy, and no sale allowed to be valid which is made on the ground of necessity, unless the necessity be clearly made out. In this case the jury were properly directed to inquire if a sale was necessary, and they have found that it was not. There was no pretence for a sale; the ship was in a British province, the cargo was not perishable, and warehouses might have been had, where the property could have been secured until the owners' directions as to what was to be done with it, should be received. The purchaser must have been aware of all this; he knew, by the advertisement of sale, that it was property that came by the ship *Cerberus*, and he either did inquire, or ought to have inquired under what circumstances she came to the Cape, and why her cargo was sold. Supposing the law of Holland to be (as it is stated to be) the same as the law of England, this knowledge will prevent the purchaser from protecting himself under a sale in market overt. The law relative to sales in market overt will not render a sale valid when the buyer knows that the seller had no authority to sell. That is distinctly stated by Lord Coke, 2 Inst. 713.

Rule refused.

WINN v. INGILBY, Bart., and HAUXWELL.—p. 625.

A sheriff has no right under a *fi. fa.* to seize fixtures where the house in which they are situated is the freehold of the person against whom the execution issues.

TRESPASS for breaking and entering plaintiff's house, and taking his fixtures, goods, and chattels. Justification under a writ of *fi. fa.* directed to the defendant, Ingilby, as sheriff of the county, under which the defendant, Hauxwell, his bailiff, peaceably entered the premises, and seized, &c. Replication de injuria, &c. At the trial at the last assizes for Yorkshire, before Cross, Serjt., the only question was, whether the defendants were justified in seizing, under the execution, some fixtures, consisting of set-pots, ovens and ranges. It appeared that the house where these were fixed was built on the plaintiff's own freehold, and the learned serjeant was of opinion, that under these circumstances they were not seizable by the sheriff, under an execution. The plaintiff accordingly had a verdict. And now,

Littledale moved to enter a verdict for the defendants. In *Poole's case*, 1 Salk. 368, it was held that the sheriff might take in execution vats, coppers, &c., which had been put up by a soap-boiler in order to carry on his trade; and whatever the tenant, as between himself and

the landlord, may remove, the sheriff may seize. He referred also to *Elwes v. Maw*, 8 East, 38, and *Ex parte Quincy*, 1 Atk. 477.

Per Curiam. The verdict is right, for these were fixtures which would go to the heir, and not to the executor, and they were not liable to be taken as goods and chattels under an execution. Here, the house where they were fixed was the freehold of the plaintiff, which distinguishes this case from those cited. Rule refused.

DOE on the Demise of Sir E. NEPEAN v. BUDDEN.—p. 626.

Where a copyholder has been admitted to a tenement and done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture from showing that the legal estate was not in the lord at the time of admittance.

EJECTMENT for premises in the county of Dorset. At the trial, at the last assizes before PARK, J., for that county, it appeared, that the defendant was the widow of George Gibbs Budden, and held the estate in question by the custom of freebench, in the manor of Loders and Bothenhampton. It was proved, clearly, that there had been a forfeiture. On the 16th October, 1794 (at which time Robert Gummer, Esquire, was the lord of the manor), upon the surrender of Thomas Symes, Henry Budden was admitted to the reversion of the estate in question, as trustee, to hold the same to the use of George Gibbs Budden for life, after the determination of the estates of Henry and Robert Budden in the premises, and George Gibbs Budden was admitted as tenant thereof in reversion. Henry Budden survived Robert, and died in 1807, and in 1808, George Gibbs Budden was admitted to the premises by Sir E. Nepean, then lord of the manor. *Adam*, at the trial, proposed to show, by the deed, dated 1800, under which Sir E. Nepean claimed title, that the legal estate in the manor was not vested in him, but in a trustee, and, consequently, that this ejectment could not be maintained. The learned Judge was of opinion that the defendant's husband having been admitted under Sir E. Nepean, she could not be allowed to dispute the lord's title. The lessor of the plaintiff, therefore, had a verdict. And now,

Adam moved for a new trial, and contended, that the title of the defendant really depended on the surrender and admission in 1794, and that the admission in 1808 was only in the nature of an attornment, in which case, according to *Rogers v. Pitcher*, 6 Taunt. 202, the tenant may still dispute the landlord's title. The act of admittance by the lord is merely ministerial, and no interest passes from him to the tenant. How then can the admittance be taken to estop the tenant from disputing the lord's title?

Per Curiam. The evidence was properly rejected. When the party under whom the defendant claims title was admitted, in 1808, he did fealty, and acknowledged himself tenant to Sir E. Nepean, and she cannot now be permitted to dispute his title to the manor. It is

not suggested that the legal estate has been altered since 1808. In the case referred to, the tenant, notwithstanding attornment, is allowed to set up the *jus tertii*, where it appears that he is co-operating with that third person. But here the defendant claims to set up the title of a person whose name the plaintiff would have been entitled to use in the ejectment.

Rule refused.

GUTHRIE *v.* ARMSTRONG.—p. 628.

Where a power of attorney was given to fifteen persons jointly or severally therein named, to execute such policies as they or any of them should jointly or severally think proper: *Held*, that an execution of such power by four of the persons named was sufficient.

ASSUMPSIT against the defendant as underwriter on a policy of insurance. Plea, general issue. At the trial at the last assizes for Northumberland before **BAYLEY, J.**, a question arose as to the execution of the policy by the defendant. In order to prove this, a power of attorney signed by the defendant was produced, by which he constituted fifteen persons, there named, "his true and lawful attorneys, jointly and separately for him, and in his name, to sign and underwrite all such policies of insurance, as they his said attorneys or any of them should jointly and separately think proper." The policy was executed for the defendant, by four of the persons named in the power of attorney. The learned judge thought this a sufficient execution of the power, but reserved the point. The plaintiff having obtained a verdict.

J. Williams moved to enter a nonsuit. This was a naked authority, and must be construed strictly. In *Viner's Abridgment*, title Authority, B. pl. 7, it is laid down thus: "If a letter of attorney to make livery of seizin conjunctim et divisim be made to three, and two of them make livery, the third being absent, it is not good, for this is not conjunctim nor divisim." And *Com. Dig. Attorney*, C. 11, is exactly to the same effect. And in *Co. Litt.* 181 b, it is stated, "If a charter of feoffment be made, and a letter of attorney to four, or three, jointly or severally to deliver seizin, two cannot make livery, because it is neither by the four or three jointly, nor any of them severally." Here, the power is to fifteen jointly or severally, and it is neither executed by the whole jointly, nor by one of them severally. The latter words, "or any of them," only apply to the persons who are to exercise the discretion, but they have no reference to the authority itself.

ABBOTT, C. J. The law undoubtedly is as stated by Mr. *Williams*, but we are not disposed to extend the rule further. Whenever a case exactly similar to those cited shall occur, the Court will feel itself bound by them. But in this case we ought to look at the whole instrument: and if we do so, there is no doubt what the meaning of it is. Here, a power is given to fifteen persons jointly and severally to execute such policies as they or any of them shall jointly or severally think proper. The true construction of this is, as it seems to me, that the power is given

to all or any of them to sign such policies, as all or any of them should think proper. The argument is, that the latter words only apply to the persons who are to exercise the discretion. That would have been quite correct, if those had been different from the persons entrusted with the power. But they are the same; these latter words, therefore control the meaning of the former, and the verdict is right.

Rule refused.

RIVERS v. GRIFFITHS.—p. 630.

To an action on bill of exchange, the defendant pleaded non-assumpsit to all but a part, and as to that part a tender. Replication, that after the cause of action accrued, and before the tender, the plaintiff demanded the sum tendered: *Held*, that this issue would only be supported by proof of the demand of the precise sum tendered.

DECLARATION upon a bill of exchange for 10*l.* 4*s.*, drawn by the plaintiff on the 15th March, 1821, payable two months after date, and accepted by the defendant. Count for goods sold and the common money counts. Plea, as to all but the sum of 4*l.* 7*s.* 6*d.* parcel, &c., non-assumpsit; and as to that a tender. Replication, that, after the making of the promises in the declaration mentioned, as to the said sum of 4*l.* 7*s.* 6*d.*, parcel, &c., and after the time when the causes of action mentioned in the declaration accrued to the plaintiff, in respect thereof, and before the defendant tendered and offered to pay the same, as in his plea was alleged, to wit, on the 18th day of May, 1821, the plaintiff demanded the said sum of 4*l.* 7*s.* 6*d.*, parcel, &c., from the defendant and requested him to pay the same, but that the defendant refused so to do; by reason whereof, he, the plaintiff, sustained damages, by reason of the non-payment of the said sum of 4*l.* 7*s.* 6*d.*, parcel, &c., in that behalf alleged. Rejoinder, taking issue upon the demand. At the trial, before ABBOTT, C. J., it appeared, that the bill was presented when due, and payment demanded. On the following day 7*l.* was paid on account. The defendant was indebted to the plaintiff for goods in a further sum of 1*l.* 3*s.* 6*d.* No other demand was proved. The Lord Chief Justice was of opinion, that the plaintiff ought to have proved a demand of the specific sum mentioned in the replication, and a verdict passed for the defendant, with liberty to the plaintiff to move to enter a verdict with nominal damages.

Campbell now moved accordingly, and contended, that the issue was proved by the fact of the plaintiff's having demanded the larger sum, and that the maxim *omne majus continet in se minus* applied. In *Wade's case*, 5 Rep. 115 a, it was resolved, that if a man tenders more than he ought to pay, it is good, for the other ought to accept so much of it as is due to him. *Douglas v. Patrick*, 3 T. R. 688, is an authority to the same effect. Now, in this respect,* there is no distinction between a demand and a tender. The sum of 4*l.* 7*s.* 6*d.* tendered, and

* See *Spybey v. Hide*, 1 Campb. 181.

alleged to have been previously demanded, must be taken to be part of the 10*l.* 4*s.* for which the bill was given: and the whole of the larger sum having been previously demanded, each and every part of it was demanded, and therefore there had been a prior demand of the said sum of 4*l.* 7*s.* 6*d.*

Per Curiam. The issue is on the specific fact, whether the plaintiff did or did not, before the tender of 4*l.* 7*s.* 6*d.*, demand that very sum of the defendant. The proof is, that he demanded 10*l.* 4*s.* That proof does not support the issue. If the smaller sum only had been demanded, the defendant might have paid it. He did, in fact, pay 7*l.* on the following day.

Rule refused.

RUCK v. HATFIELD.—p. 632.

Where goods were sold, free on board, and upon their shipment the agent of the vendors tendered to the mate (the captain being absent) a receipt, by which the goods were acknowledged to be shipped on account of the vendors, which the mate kept but refused to sign, and on the following day signed bills of lading to the orders of the vendees: *Held*, that the transitus was not at an end, but, that on the insolvency of the vendees, the vendors were entitled to stop the goods.

TROVER for 35 puncheons of rum. Plea, general issue. At the trial at the last Guildhall sittings before ABBOTT, C. J., it appeared, that on the 20th of July, 1821, Eybe and Schmack bought of the plaintiff 25 puncheons of rum at 1*s.* 5*d.* per gallon free on board. On the 24th of July, a similar bargain was made for 10 puncheons more at 2*s.* per gallon, free on board. On the 2nd of August, invoices of the goods were sent to E. and S. by the plaintiff; and on the same day the plaintiff drew a bill for the amount, which was accepted by E. and S. The rum had been shipped on the 30th July, on board the *Chance*, of which the defendant was master, by a lighter hired by the plaintiff, at which time the master of the lighter tendered to the mate, who had the command of the vessel, a receipt by which the rum was acknowledged to be shipped on account of the plaintiff. This receipt the mate kept, but refused to sign, and on 31st July, the defendant signed bills of lading, by which he undertook to deliver the rum to certain merchants at Hamburg, the correspondents of E. and S. On the 10th of August, on which day E. and S. stopped payment, the plaintiff sent down a clerk to the defendant to tender a formal receipt for him to sign, stating, that he had received the rum on the plaintiff's account. This, however, the defendant refused to do. The Lord Chief Justice thought, that in this case the transitus was not at an end by the delivery on board the ship under the above circumstances, and that it was the duty of the defendant to have signed the receipt tendered to him, and not to have signed the bills of lading until that receipt had been handed over by the plaintiff to E. and S., and by the latter to him. The plaintiff accordingly had a verdict. And now,

Gurney moved for a new trial. The contract speaks of the goods being delivered free on board, which shows that the ship must be considered as the warehouse of E. and S., and that the transitus was at an end by the delivery there. Here, too, a bill for the amount was drawn by the plaintiff, and the invoice of the goods delivered on the 2d of August. At that time, therefore, the transitus was at all events at an end. Here, too, E. and S. are the consignors of the goods. In *Craven v. Ryder*, 2 Marsh. 127, 6 Taunt. 433, S. C., the master had signed a receipt when the goods were put on board. Here he did not do so, and though he ought to have done so, perhaps on the 30th July, the plaintiff's conduct on the 2d of August was a waiver of it. That case is, therefore, distinguishable materially from the present.

ABBOTT, C. J. If the delivery on board the vessel to E. and S. had ever been completed, the transitus would have been at an end. But when it was made at first, it was accompanied by the demand of a receipt from the mate who represented the defendant. Now it was important for the plaintiff to have that receipt, for so long as he retained possession of it, he was enabled to interpose a delay as to the delivery of the rum to E. and S., and retained a lien upon it. The defendant ought not to have signed bills of lading until that receipt had been handed over to him by E. and S., after having been delivered to them by the plaintiff. The verdict is, therefore, right.

Rule refused.

PIPPET v. HEARN.—p. 634.

An action lies for the malicious prosecution of a bad indictment for perjury: *Held*, also, that a count stating that defendant had maliciously indicted plaintiff for wilful and corrupt perjury, is good after verdict, although the count did not set out any indictment.

ACTION on the case for a malicious prosecution for perjury. The declaration contained two counts, the first of which set out the indictment for perjury, which had been preferred against the plaintiff; by which it appeared, that a certain cause had been depending in the King's Bench, between Bridges and Hearn, and that such proceedings were had that a writ of inquiry was duly issued out of the said court, directed to the sheriffs of London, to inquire, &c., and that the said sheriffs should make appear the inquisition which they should take thereof, before the justice of our said lord the king, at Westminster. The indictment then set out the taking of the inquisition before the Secondary, and alleged the perjury of the plaintiff, as having been committed on that occasion.

The second count of the declaration did not set out any indictment, but merely stated, that defendant, at a general session of oyer and terminer of our said lord the king, holden for the city of London, at the Justice-hall, in the Old Bailey, within the parish of, &c., maliciously.

and without any reasonable or probable cause whatsoever, indicted and caused, and procured to be indicted, the said plaintiff, for wilful and corrupt perjury, &c. Plea, general issue. At the trial, at the last Guildhall sittings, before ABBOTT, C. J., the plaintiff obtained a verdict, damages 150*l*. And now,

Plutt moved to arrest the judgment. Both counts are defective. By the first it appears, that the alleged perjury was committed coram non iudice; for the writ of inquiry was issued out of the King's Bench, and made returnable in the Common Pleas. The Secondary had, therefore, no jurisdiction to administer the oath. The second count is too general. The indictment must be set out, and here it is only stated, that the defendant maliciously indicted the plaintiff for wilful and corrupt perjury. In Com. Dig. tit. Action on the Case for a Conspiracy, C. 4, it is laid down, that the declaration must show a good indictment, otherwise he cannot be lawfully acquitted; and *Sherington v. Ward*, Cro. Eliz. 724, is also in point. It would be bad to say, that the defendant maliciously indicted the plaintiff for felony: for, by such a general statement, the defendant cannot know what the charge against him is.

Per Curiam. There may be a distinction between the case put of felony and perjury; the former may embrace a variety of charges, but perjury is one distinct species of crime. But, at all events, this count is sufficient after verdict. As to the first count, that is also good; for we are of opinion, that, where a man maliciously prefers an indictment against another for a crime, he is liable to an action for it, although the indictment be defective; for, in either case, whether the indictment be good or bad, the plaintiff is equally subjected to the disgrace of it, and put to the same expense in defending himself against it.

Rule refused.*

* See *Chambers v. Robinson*, 2 Str. 691.

CLAYTON and Others v. LOWE.—p. 636.

Where a testator, after bequeathing a specific legacy, devised all and every other part of his real and personal estate, to be equally divided between his three grand-children, share and share alike, for ever: and also, that if either of them should happen to die, without child or children lawfully begotten, that then such part or share of the one so dying, should be equally divided amongst the surviving grandchildren; but if any of his grandchildren should die and leave child or children lawfully begotten, that such child or children should have their parents' share equally divided amongst them, share and share alike: *Held*, that under this devise, the grandchildren took an estate in fee simple, as tenants in common.

THE Vice-Chancellor sent the following case for the opinion of this Court: William Clayton, deceased, being seized in fee simple in possession of divers real estates, and, amongst others, of one-eighth part of the Broom Stair estate, made his will, duly executed and attested, for passing real estate, and bearing date the 12th day of July, 1810; and thereby after directing his just debts, funeral and testamentary

expenses, and probate of his will to be paid by his executors and executrix, and devising his interest in Swansea colliery to his grandson, William Clayton, as for and concerning all his eighth part or share of both lands, buildings, coal, timber, and five cottage-houses, with all the appurtenants to him thereto belonging of a certain estate, situate in the township of Denton and Haughton, and then in the possession of John Hooley and others as tenants thereof, and commonly called the Broom Stair estate; and as to divers other premises in the said will mentioned both leasehold, copyhold, and freehold; and also all his household goods and furniture, corn and hay, either in the buildings, or growing, or standing on any parts of the said lands, or elsewhere, with all his stock of cattle, and all and every his implements of husbandry-ware, whatsoever and wheresoever unto him belonging, together with all the money he might happen to have by him, or out upon interest, and book-debts, and wearing apparel, together with all the rest, residue, and remainder of his real and personal estate whatsoever and wheresoever unto him belonging in the kingdom of Great Britain or elsewhere, he gave and devised the same unto his two grandsons, William Clayton, David Shaw Clayton, and his grand-daughter, Elizabeth Clayton, their several respective heirs and assigns for ever, upon trust nevertheless, and to and for the several uses, intents, and purposes thereafter expressed concerning the same; and then the will proceeded with these words: "and upon trust that my trustees, or the survivors of them, their heirs, or assigns, shall, immediately after my decease, take an inventory of all my household goods and furniture, stock of cattle, hay, corn, and husbandry-ware, together with all the money I may have by me, or out upon interest, at the time of my decease, together with my book-debts, and all other my personal estate whatsoever, and pay out of the same all my just debts, funeral expenses, the probate of this my will, and all other unavoidable charges concerning the same, and all upon trust that my trustees, or the survivor of them, their heirs or assigns, shall pay unto my daughter-in-law, Catharine Clayton, the mother of my trustees, yearly and every year during the time and term of her natural life, all the interest that may arise and become due of and from the sum of 500*l.*, which I have now down upon interest upon the turnpike-road from London through Buxton to Manchester; and also upon trust, that after the decease of my said daughter-in-law, Catharine Clayton, I will that the said sum of 500*l.*, and interest thereof, together with all and singular the yearly rents arising of and from my said estates hereinbefore mentioned and expressed, with my interest in any coal-mines, book-debts, money I may have by me, or out upon interest at the time of my decease, with all and every other part of all my real and personal estate whatsoever or wheresoever, as hereinbefore mentioned and expressed, shall be equally divided between my said grandsons, William Clayton and David Shaw Clayton, and my grand-daughter, Elizabeth Clayton, share and share alike for ever, the Swansea colliery, hereinbefore devised to my grandson, William Clayton, only excepted. And also, that if either of my said grandsons, William Clayton and David Shaw Clayton, or my said grand-daughter, Elizabeth Clayton, shall happen to die without child or children lawfully begotten, that

then, I will order and direct, that such part or share of both of my real and personal estate whatsoever, of the one so dying, shall be equally divided among the surviving brothers or sister, share and share alike; but if it happens, that any of my aforesaid grandchildren shall die, and leave child or children lawfully begotten, that such child or children shall have their father or mother's share of all my estate and effects whatsoever, equally divided among them, share and share alike." William Clayton, the testator, departed this life, so seized of the said estates, soon after the making his will, and without revoking or altering the same, leaving William Clayton, David Shaw Clayton, and Elizabeth Clayton, his grandchildren, him surviving; and by virtue of the will of William Clayton, the testator, William Clayton, David Shaw Clayton, and Elizabeth Clayton, the plaintiffs, entered into, and still are in possession of the said one undivided eighth part of the messuages or tenements and close of land situate at Haughton and Denton, in the county of Lancaster, and known by the name of the Broom Stair estate, and all the estates therein devised. Catharine Clayton, the daughter-in-law of the testator, is still living. William Clayton was, at the death of the testator, his heir at law, and is still living. The question for the opinion of the Court was, what estate or interest William Clayton, David Shaw Clayton, and Betty Clayton took or were entitled to under the said will of the testator William Clayton, in one-eighth part or share of the messuage or tenement and closes of land situate at Haughton and Denton, in the county of Lancaster, and known by the name of the Broom Stair estate. This case was argued in last term by

Sugden, for the plaintiffs. In this case the plaintiffs took a fee simple in the 8th share of the Broom Stair estate. This was a devise of both real and personal property, whatsoever and wheresoever, to be equally divided between his grandchildren, share and share alike for ever. These words are sufficient to carry a fee, and admit of no doubt. But then follow the gifts over, viz. that in case any of his grandchildren die and leave no children, then the share of such grandchild should be equally divided amongst the surviving brothers or sister, share and share alike, and in case they died, leaving children, then the share to be divided amongst those children, share and share alike. He seems, therefore, to have contemplated the estate going over in every possible contingency. If, however, such had really been his intention, he would have given to his grandchildren estates for life, with remainders over in all their events. In cases of such incongruous wills, the Courts have usually considered the gifts over as substitutionary, and as depending on the contingency of the death of some of the devisees, in the lifetime of the testator. That consideration makes this will perfectly clear: *Wright v. Stephens*, 4 B. & A. 574, and *Doe v. Sparrow*, 13 East, 359, are authorities in point. And here, there is a combined gift both of real and personal property, which makes this case stronger than the case of *Doe v. Sparrow*.

C. P. Cooper, contra. Here, the grandchildren took a fee simple, determinable in the event of their dying without issue living at their death, and then the other limitations over may be good by way of exe-

cutory devise. It may be admitted, that the words of the first devise to the grandchildren are sufficient, if alone, to carry a fee, but they are qualified by those which follow. In *Roe v. Jeffrey*, 7 T. R. 589, the devise was to T. Faud, his heirs for ever, and in case he should depart this life and leave no issue, then to E. M. and S., or the survivor or survivors of them, share and share alike; and it was held by the Court, that the devise over to E. M. and S. was a good executory devise. There Lord KENYON relied on the circumstance, that the devise over was to persons in esse. *Pells v. Browne*, Cro. Jac. 590, *Porter v. Bradley*, 3 T. R. 143, *Doe v. Wetton*, 2 Bos. & Pul. 324, *Doe v. Frost*, 3 B. & A. 546, and *Doe v. Webster*, 1 B. & A. 713, are also authorities in point. There the courts have held, in furtherance of the intention of the testators, that the devises over were good by way of executory devise. Here too, the first devise is not to take place till after the death of Catherine Clayton. The testator might therefore mean, that the devise over should be in case any of his children should die, leaving no issue at the time of the death of Catherine Clayton. In that case, the limitations over would be good by way of executory devise. But, whether this be so or not, in either case, the plaintiffs cannot make a good title to the estate.

Sugden, in reply. The cases cited are not applicable to the present. In all of them, the question was, whether the devise over was so tied down to a particular event and particular period, as to make the limitation over, good as an executory devise, or whether the devise over was general, and so cut down the prior estate in fee into an estate tail. But here it is very different, in the case of an executory devise, the fee is left to the first devisee except in one particular event. Here, it is to go over in all possible contingencies. Unless, therefore, the first devise be of an estate for life, nothing can be made of the will. If then it be once admitted, that by the first devise, if alone, a fee would pass, there is an end of the case. As to the devise to Catherine Clayton, it is only of an annuity arising out of a particular sum of money secured on a particular road. It is impossible that the beneficial interest as to the other property, could be intended to be postponed till her death. It is clear, that that was to go over at the testator's decease. If so, there is nothing in the last argument on the part of the defendant.

Cur. adv. vult.

The following certificate was afterwards sent :

We have heard this case argued by counsel, and are of opinion, that William Clayton, David Shaw Clayton, and Betty Clayton, took under the will of the testator William Clayton, an estate in fee simple, as tenants in common in one-eighth part or share of the messuage or tenement and closes of land situate at Haughton and Denton in the county of Lancaster, and known by the name of the Broom Stair estate.

C. ABBOTT,
J. BAYLEY,
G. S. HOLROYD

FAIRMAN *v.* IVES.—p. 642.

A petition addressed by a creditor of an officer in the army to the secretary at war, *bonâ fide*, and with a view of obtaining, through his interference, the payment of a debt due; and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel for which an action is maintainable. In such an action, even upon the general issue, evidence may be received to show that the writer *bonâ fide* believed the facts stated in the petition to be true.

THE declaration stated, that the plaintiff had been an officer in the army, and was used to receive half-pay; yet, that the defendant, intending to cause it to be believed that the plaintiff was incapable to pay his just debts, and to cause his half-pay to be suspended, and unjustly to compel the payment of a supposed debt of 175*l.*, alleged to be due from the plaintiff to the defendant, published the libel in question, purporting to be a petition, addressed to Lord Palmerston the secretary at war, enclosing two bills of exchange, drawn by one Wright upon the plaintiff, by the description of W. Fairman, No. 6, Surrey Street, Strand, payable three months after date to the drawer's order, and by plaintiff accepted, payable at Austen, Maund, and Co.'s, and enclosing a certain writing annexed to the copy of the bill: "Answer at Austen, Maund, and Co.'s; left no orders about the bill. Answer at No. 6, Surrey Street, that W. B. Fairman did not reside there, and that there were no orders to pay the bills." The declaration then set out the libel, which was as follows: "Your petitioner solicits your lordship's well-known justice and disposition to benevolence to be extended towards him, by directing an officer in his majesty's service, Captain W. B. Fairman, to discharge a debt which has been due to your petitioner above four years, and although frequently applied for, has never been noticed by Captain Fairman, but unjustly and unfairly he has deprived your petitioner of any redress, except through your lordship's humane consideration, by giving an address, as will appear by the enclosed, where he had no credit, nor even was known. Your petitioner begs most humbly to enclose copies of two bills of exchange, one for 100*l.* and the other for 75*l.* 10*s.*, which your petitioner received in payment as money, and, when due, Captain Fairman had given no order to pay them, either at his agent's or at the address of his bills, where your petitioner was informed he did not reside, nor did they know any thing about his bills. Since that period your petitioner has repeatedly written to Captain Fairman, who, although he has received the letters, has never noticed them, and has concealed himself from a just and lawful demand: your petitioner has no other wish in addressing your lordship, but that your influence may be extended towards him, by ordering Captain Fairman to discharge his debt." Plea, not guilty. At the trial before ABBOTT, C. J., at the last London sittings, the defendant proved that two bills of exchange mentioned in the libel were accepted by the plaintiff, and that when presented for payment at Austen, Maund, and Co.'s, the answer was, that there were no orders, and the answer to the inquiries at No. 6, Surrey Street, was, that the plaintiff did not reside there, nor did the persons who lived there know any thing about him. The Lord Chief

Justice told the jury, that if they thought that the petition contained only a fair and honest statement of facts, according to the understanding of the party who sent it, they ought to find a verdict for the defendant. The jury having so found,

F. Pollock now moved for a new trial, and contended, that as the defendant had not pleaded any justification, the evidence of the truth of the facts contained in the libel ought not to have been received. For, upon this issue, the only question was, whether the matter set forth was injurious to the plaintiff's character, and whether the defendant published it.

ABBOTT, C. J. I am of opinion that the evidence was properly received, to show the circumstances under which the supposed libel was published; and, I think it was a good answer to the action, upon the plea of not guilty, for the defendant to show that the paper in question was addressed to the secretary at war, bona fide for the purpose of obtaining redress, and not for the purpose of slandering the plaintiff.

*HOLROYD, J.** I think the direction given by my Lord Chief Justice to the jury was perfectly right. In the case of *Cleaver v. Sarraude*, cited in 1 Camp. 268, which was tried at York, it was expressly held, that no action was maintainable for matter contained in a written communication made bona fide to a friend, and not for the purpose of slandering. The two cases are not exactly similar. The case cited rather resembles that of a bad character, given by a master of his servant. There, unless it be maliciously done, the communication is considered privileged by the occasion on which it is made. So, in the case of a confidential communication made between friends, to prevent an injury, and not for the purpose of slandering, the occasion justifies the act. If the communication be made maliciously, the case would be otherwise; and the falsehood of the facts stated might, in some cases, be evidence of malice. In the case of words spoken by a barrister,† in the course of a cause, it may not be, perhaps, sufficient to allege and show even that the words are false and malicious, without also alleging and showing that they were uttered without reasonable or probable cause. The truth, indeed, of the facts, which form the subject-matter of the slander, generally speaking, can only be given in evidence when specially pleaded; but in that case the speaking or publishing of the slander is not justified by the mere occasion on which it is spoken or published, but because it is true. See *Smith v. Richardson*, Willes, 20. By showing the truth of the slanderous matter, which is the subject-matter of the action, you do not show that it was not maliciously spoken or published, but merely that the party is not entitled to damages, because he is guilty of the charge imputed. On the other hand, by showing that the slander was spoken or published on a justifiable occasion, you show that it was not done maliciously; and that goes to the very gist of the action. See Willes, 24. Then, the question in this case is, whether the publication was not justified by the occasion

* Bayley, J., had left the Court.

† See note (b) in *Hodgson v. Scarlett*, 1 B. & A. 245.

Here, the defendant having a just claim against the plaintiff, an officer in the army, and who, therefore, in some measure, is subject to the control of the secretary at war, applies by petition to the latter, in order to obtain, through his interference, the payment of his debt. This therefore, was a communication, not for the purpose of slandering, but for the purpose of obtaining redress for an injury, and made to a public officer, who, it was supposed, had the means of giving such redress. I am of opinion, that the letter having been published for the purpose of obtaining redress, and not for the purpose of slander, the plaintiff is not entitled to recover.

BEST, J. I think that there was not a sufficient publication, in this case, to support an action for a libel. The letter complained of was addressed to the secretary at war, and was delivered to him, and to him only, with an intent to prevail on him to exert his authority to compel the plaintiff, an officer in the army, to pay to the defendant a debt. The defendant seems to have felt that the plaintiff had treated him very ill, and the letter contains such expressions as an angry man was likely to use, and such as would have rendered the letter a libel if it had been sent into general circulation, or to any individual, without a sufficient cause to justify the sending of it. But the circumstances under which this letter was sent rendered it a privileged communication. It was an application for the redress of a grievance, made to one of the king's ministers, who, as the defendant honestly thought, had authority to afford him redress. And this may be done without hazard of an action or prosecution, if the application be made bona fide with a view to obtain redress for some injury received, or to prevent or punish some public abuse. In the case of *The King v. Bayley*, 3 Bacon's Abr. n. *Libel*, A. 2, a letter addressed to General Willes and the four principal officers of the guards, to be by them presented to the king, stating that the prosecutor had obtained from the defendant a warrant for the payment of money due to him from government, under the promise of paying the defendant such money, and that the prosecutor had received the money, and had not paid it over to the defendant; was held to be no libel, but a representation of an injury, drawn up in a proper way for redress. That case is like the present. Neither the officers nor the king could give the defendant direct assistance in receiving the money wrongfully withheld. But the king had authority to dismiss an officer from his service, and most probably would dismiss any one who hesitated to do what honor and justice required. In the present case, there was, at least, probable cause for thinking that the secretary at war would advise his majesty, that the plaintiff was not worthy to remain in the army, unless he did the defendant immediate justice.

In the case of Colonel Bayley, Lord Mansfield intimates an opinion, that an address to the governors of Greenwich Hospital, delivered to the governors only for the purpose of calling their attention to abuses supposed to exist in the hospital, was not a libel. Upon the same principle, the pleadings and evidence in a judicial proceeding, whether civil or criminal, cannot be libels, even though the court in which they are produced has no jurisdiction over the cause. And petitions to the king

upon matters in which the crown cannot directly interfere; and petitions to parliament, although the petitioners, beside presenting them to the house, print them, and distribute them amongst the members, fall within the same rule. All these are protected, in order that men may not be prevented, by the dread of a prosecution or action, from making communications which may be either important to themselves, or beneficial to the public. This privilege, however, must not be abused; for, if such a communication be made maliciously, and without probable cause, the pretence under which it is made, instead of furnishing a defence, will aggravate the case of the defendant. There is, also, a material difference between sending a letter for such a purpose as that in this case and publishing it to the world, or sending it to any private individual. In the former case, the object of obtaining redress repels the presumption of malice, on which actions for slander are founded. In the other cases it is quite different, for it must be there the only object.

Rule refused.

HAMILTON v. STOW.—p. 649.

An act of parliament, imposing a tonnage duty on vessels coming into the harbour of Dover, contained an exception of all vessels employed in his majesty's service: *Held*, that a vessel hired by a post-master-general, to carry the mails and government despatches to and from Dover to Calais, &c., the master of which was permitted to carry passengers and their luggage, and bullion, upon freight, is a vessel coming within the exception.

TRESPASS for seizing and taking plaintiff's telescope. Plea, first, not guilty; secondly, justifying the seizure, as the collector of the rates and duties payable at the harbour of Dover, in respect of a duty of three-pence per ton, payable by the plaintiff as the master of a ship called *The Lord Duncan*. Replication, that the said ship, at the time she came into the harbour of Dover, as in the plea mentioned, and from thence until at the said time, when, &c., was employed in the service of his majesty. Rejoinder, that the said ship was not employed in the service of his majesty, as alleged in the replication; upon this issue was joined. The cause was tried at the Kent summer assizes, 1820, and the jury found a special verdict; which stated the following facts: The vessel upon which the rate of 8*d.* per ton was demanded, was a packet called *The Lord Duncan*, and was, at the time of the committing of the trespasses, employed in the service of his majesty in carrying the public mails of letters and despatches of his majesty's government from Dover to Calais and Ostend, and in bringing back letters and despatches of his majesty's government from Calais and Ostend to Dover. At the time of the committing of the trespass, the plaintiff was the commander of the vessel, and was so appointed in the year 1807 by the postmaster-general: it appeared by the appointment, that he was appointed to be the commander of *The Lord Duncan* packet boat, employed by the post-office, in his majesty's service, to

carry mails to and from Dover, Harwich, &c., and he was thereby required to obey such orders as he should from time to time receive from the postmasters or their agent for the time being. The plaintiff, as commander of the vessel, was permitted by the postmasters-general to convey in the vessel, to and from Dover to Calais and Ostend, upon freight, passengers, together with their baggage, horses, and carriages, and also bullion and foreign specie. The several packets employed in his majesty's service sailed from Dover to Calais with public mails of letters and dispatches, in rotation, four times a week, and twice in each week to Ostend, and return in rotation to Dover. The *Lord Duncan*, and each of the other packets, is the private property of its respective commander. The plaintiff, on the 6th of June, 1819, came into the harbour of Dover with *The Lord Duncan* from Calais; the vessel brought no mail of letters, but had on board dispatches for the secretary at war, and several passengers, and a carriage belonging to one of them, together with bullion to the amount of 21,250*l.* sterling, arrived in the vessel, and the plaintiff received from the passengers the sum of 12*l.* 10*s.* for their passage-money, and from the owner of the carriage two guineas for the freight, and 10*l.* 12*s.* for the freight of the bullion. The captain, by the public regulations, was permitted to retain, and did retain, two third parts of those several sums, and he paid the other third part to the agent for the packets at Dover. The special verdict then stated that the ship had no other goods or merchandises on board, and that none of the said packets were licensed by the commissioners of customs to carry goods, wares, or merchandises.

Bolland, for the plaintiff, contended that this vessel, at the time of the trespass, was in his majesty's service within the meaning of the 47 G. 3, c. 69, s. 5, by which it was provided, that the act should not be extended to charge any vessels belonging to his majesty, or that shall or may be employed in his service, with any of the rates or duties to be imposed by the act.

Chitty, contra. This vessel was the private property of the master, and he would have been liable to contribute to the poor-rate in respect of his beneficial occupation of it. *Rex v. Jones*, 8 East, 451. In that case, the appointment was nearly in the same terms. The exemption contained in the 47 G. 3, c. 69, is one to which the crown would be entitled. Here, too, the employment by the crown was partial; for the master might carry goods of a particular description; and, therefore, as to all purposes, except that of carrying the letters and public dispatches, the vessel was not in the employ of government.

ABBOTT, C. J. The statute contains two exemptions; first, all vessels belonging to his majesty; and, secondly, all vessels employed in his service. The case of *Rex v. Jones* is a good authority to show, that the vessel, in this case, belonged to the captain, and not to the king; but it does not apply to the latter branch of exemption. It is impossible to say that this vessel was not employed in his majesty's service, when it came into Dover. The captain is appointed by the postmaster-general. The appointment of the captain states the vessel to be employed in his majesty's service; and he is directed to obey such orders

as he shall from time to time receive from the agents of government. This latter stipulation is quite inconsistent with the right of employment being in the captain. Whatever is taken on board the vessel, besides the mails and dispatches, is by the express permission of government. I am clearly of opinion that this vessel was, at the time of committing the trespass, in the service of his majesty.

Judgment for the plaintiff.

ORTON v. BUTLER.—p. 652.

A count stating that defendant had and received to the use of the plaintiff a certain sum of money, to be paid by the defendant to the plaintiff upon request; and the non-payment upon request, and that the defendant converted and disposed thereof to his own use, is bad upon demurrer.

THE declaration in this case contained three counts. The two former of which were framed in case for a deceit by the defendant, in fraudulently asserting that he (having been employed in purchasing for the plaintiff a certain fish, and having purchased it for twelve shillings and sixpence,) had purchased it for one pound two shillings and sixpence, whereby he obtained the last-mentioned sum from the plaintiff. The third count was as follows. And, whereas also the said defendant afterwards, to wit, on, &c., at, &c., had and received for the use of the plaintiff, a certain sum of money; to wit, the sum of ten shillings to be paid by the defendant to the plaintiff upon request. Yet the defendant not regarding his duty on that behalf, but contriving, &c., hath not, although often requested, paid to the plaintiff the last mentioned sum of money, or any part thereof, but hath wholly omitted so to do; and on the contrary thereof, afterwards, to wit, on, &c., at, &c., converted and disposed thereof to his own use. The defendant pleaded to the two first counts the general issue, and demurred specially to the last count.

E. Alderson, in support of the demurrer. A similar question to the present came before the Court in *Samuel v. Judin in Error*, 6 E. 335, 1 New R. 43, S. C. There the ground of the demurrer was the misjoinder of a count like the present, with other counts framed in tort, and though the Courts of Common Pleas and King's Bench both held that the objection was not sufficient, yet the judges seemed to intimate strongly, that the count, if particularly demurred to, would be bad. This is in fact, a count for money had and received, framed in tort. And if this be allowed, there will no longer be any distinction between case and assumpsit. The consequences of this will be productive of great inconvenience. A party may be thereby deprived of his plea in abatement, and his set-off may be defeated by so framing the count. For the statutes of set-off speak only of mutual debts. So again, if a cause of action be within the jurisdiction of an inferior court, as for instance, the London Court of Requests, and the plaintiff recovers under 5*l.* damages, he may, by framing his count in the present mode,

defeat the act, which would otherwise deprive him of his costs. For the statute 3 Jac. 1, c. 15, s. 4, is expressly confined to actions of debt, or upon the case in assumpsit.

Tindal, contra. This is substantially a count in trover. There is a delivery of money to the defendant, and a misfeasance on his part by converting of it to his own use. Instead of stating a finding by the defendant, it states a bailment to him, but that is quite sufficient. It may be, however, said, that as a count in trover, it is bad, not being sufficiently certain. For it only states a sum of money to have been had and received by defendant, and not certain specific pieces of money. But this is only a cause of special demurrer, and is not assigned as a cause in the present case. The count therefore, is in fact framed in tort, and the only objection is, that it is not framed with sufficient certainty. A similar count to the present was drawn in the case of *Samuel v. Judin*, 1 New R. 43, and the Court then gave no opinion against its sufficiency. There are many actions quasi ex contractu, where a count may be framed either in assumpsit or case, according as it may be most convenient to the plaintiff.

E. Alderson, in reply, was stopped by the Court.

ABBOTT, C. J. The law has provided certain specific forms of action for particular cases, and it is of importance that they should be preserved; we ought therefore to look with great jealousy to an innovation of this sort. The present count states, that the defendant had and received to the use of the plaintiff, a certain sum of money, to wit, ten shillings to be paid to the plaintiff, but which the defendant converted to his own use. It is contended, that this is a count in trover. Now, the action of trover is only maintainable for specific property; it will lie for so many pieces of gold or silver, and in that case a defendant can only redeem himself by tendering to the plaintiff the same specific pieces. But in this case he clearly might do so, by returning an equal sum of money. There is, therefore, not merely a want of certainty in the count, but it states that which is not the subject of an action of trover at all. The demurrer, therefore, must be allowed.

BAYLEY, J. I think we ought not to accede to the innovation attempted in the present case. The statute of Westminster gave the action on the case, where there was previously no proper form in the register, and from Slade's case, 4 Rep. 92, to the present time the remedy for money had and received has been either by an action of assumpsit or debt. The question is now, whether the plaintiff can form a third; if we were to allow that, the provisions made in many instances by different acts of parliament would be evaded, and the instance to which we have been referred of the statute 3 Jac. 1, c. 15, s. 4, shows strongly the inconvenience that would result from such a decision.

HOLROYD, J. I am of the same opinion. It is admitted, that this is not in point of form well framed in trover, but it is argued that it is so in effect. But I cannot agree with that argument; no part of the count alleges the money had and received, to have been previously the plaintiff's property, or in his possession, and consistently with it, the defendant might have received the money from a third person. And

there is nothing stated in the count to show, that the plaintiff had assented to its being his money at the time when the conversion took place. There being no precedent for any such count as this, and the regular form having hitherto been either debt or assumpsit, I am of opinion, that the present count is not sufficient.

BEST, J. This is an innovation upon the old forms established by law, and therefore ought not to be allowed. There is a broad distinction between actions *ex contractu* and *ex delicto*. Here, it arises out of a breach of contract, and the party ought not to be allowed to proceed in the present mode of framing his count *ex delicto*, which would be attended by the inconveniences pointed out in argument. The defendant might be deprived of his set-off, and if he lived within the jurisdiction of an inferior court, of his costs, and in addition to that, would not be able to pay money into court. The action of trover is clearly not maintainable in a case like the present: there a party recovers damages for the detention of specific goods. But it would be inconsistent with justice, if, where a sum of money was delivered generally to a defendant, the Court were to hold, that he could not defend himself, unless he could prove that he had restored the same specific money delivered to him. But this would be the case if we were to allow the action of trover to be maintainable.

Judgment for the defendant.

MURRAY v. ELLISTON.—p. 657.

The manager of a theatre having publicly represented for profit, a tragedy, altered and abridged for the stage, without the consent of the owner of the copy-right, is not liable to an action, although the tragedy had been previously printed and published for sale.

THE Lord Chancellor sent the following case for the opinion of this Court. In 1820, Lord Byron wrote a book entitled *Marino Faliero*, Doge of Venice, an historical tragedy, in five acts, with notes; and by deed, dated April 14th, 1821, he assigned the said tragedy and poem, and the copy-right thereof, and the exclusive right of printing and publishing the same, and all benefit and advantage thereof, to the plaintiff, in consideration of the sum of 1050*l.*, which was duly paid. The plaintiff caused the tragedy to be printed; and, on the 21st April, 1821, copies of it were, for the first time, printed and published for sale, for the sole benefit of the plaintiff. The defendant being the manager of the theatre royal, Drury-lane, after the publication of the tragedy, printed and exposed to view, at the entrance to the theatre, and at divers other places, in the most conspicuous parts of London and Westminster, a bill of the performances at the theatre, dated 24th April, 1821, in which was contained the following notice: "Those who have perused *Marino Faliero*, will have anticipated the necessity of considerable curtailments; aware that conversations or soliloquies, however beautiful and interesting in the closet, will frequently tire in public re

rital. This intimation is due to the ardent admirers of Lord Byron's eminent talents, and will, it is presumed, be a sufficient apology for the great freedom used in the representation of this tragedy on the stage of Drury-lane theatre." And at the foot of the bill, the defendant announced and advertised the tragedy, altered and abridged for theatrical representation at the theatre, as follows: "To-morrow, for the first time, Lord Byron's tragedy of Marino Faliero, Doge of Venice." No permission or authority was at any time given by the plaintiff or Lord Byron to the defendant, or to any other person, or persons, to represent or perform the tragedy printed for the plaintiff, or any part thereof, or to give out, announce or advertise the same for theatrical representation. On the 25th April, 1821, the plaintiff filed his bill in chancery for an injunction to restrain the defendant from acting the tragedy at Drury-lane theatre, which was granted. On the evening of the same 25th day of April, the defendant publicly represented the tragedy, altered and abridged, for profit, at the theatre royal Drury-lane; but in that representation certain parts of it, which the said defendant thought not fit for representation, were omitted. The question was, whether an action could be maintained by the plaintiff against the defendant, for publicly acting and representing for profit the tragedy so abridged.

Scarlett, for the plaintiff. This question is quite different from that in *Colman v. Wathen*, 5 Term. Rep. 245. There, it turned upon the words of the statute, 8 Ann. c. 19, and the point determined was, that the acting a piece on the stage was not a publication of it within that statute. Here, the question is different; for it depends not on the statute, but on the right of property which the plaintiff has in this work. The moment such a right is established, the consequences must follow, that any injury done to the property is the subject of legal redress. This is only one mode in which it may be injured. Unfair and malicious criticism is another, and for that an action will lie. *Carr v. Hood*, 1 Camp. 355. Suppose this play failed of success when represented, the sale of the work would thereby be damaged. Besides, the curiosity of the public would be thereby satisfied, and so the plaintiff would be injured in the sale of the work. And, whether that right of property arise from the common law, or from the statutes relative to it, is in this case immaterial. For, if the statute makes a literary work property, the common law will give the remedy for the invasion of it. The only question is, whether the representation of this piece for profit may not injure the copyright. If so, the plaintiff is entitled to the judgment of the Court.

Adolphus, contra. In *Donaldson v. Beckett*, 4 Burr: 2408, the majority of the Judges were of opinion, that the action at common law was taken away by 8 Anne, c. 19, and that the author was precluded from every remedy, except on the statute and on the terms and conditions prescribed thereby. The claim by the plaintiff on this occasion is at variance with this decision. For here, he contends for a far more comprehensive security, and one coexisting with that given by the statute, and restraining the public in points of which the statute takes no notice. The case of *Macklin v. Richardson*, Amb. 694, was very different. There the farce of *Love à-la-Mode* had never been pub-

lished, and the defendant having employed a short-hand writer to take it from the mouths of the actors, published it, and it was held that he could not do so. But when in *Ullman v. Wathen*, 5 T. R. 245, the converse of this was attempted, the Court held, that the action would not lie. This decision was plainly founded on the nature of copyright, the property in which is exactly the same as if but one book existed, which the author permitted individuals to read on payment of a certain sum. The injury then which an author sustains by the violation of his copyright, is this; that a stranger, without permission, disposes of the use and possession of this, *his book*, and thereby receives the profits to which he, the author, is justly entitled. If then the book be not in all reasonable strictness such as may be called the author's own book, as if it be a bona fide abridgment, *Gyles v. Wilcox and Others*, 2 Atk. 141, shows that the author has no remedy. Now, in the present case, a theatrical exhibition falls within the principle above laid down. Persons go thither, not to read the work, or to hear it read, but to see the combined effect of poetry, scenery, and acting. Now of these three things, two are not produced by the author of the work; and the combined effect is just as much a new production, and even more so than the printed abridgment of a work. There are many instances in which works published have thus, without permission of their authors, been brought upon the stage. The safe rule for the Court to lay down is, that an author is only protected from the piracy of his book itself, or some colourable alteration of it, and in that case the defendant is entitled to the judgment of the Court.

Cur. adv. vult.

The following certificate was afterwards sent:

We have heard this case argued by counsel, and are of opinion, that an action cannot be maintained by the plaintiff against the defendant for publicly acting and representing the said tragedy, abridged in manner aforesaid, at the theatre royal Drury-lane, for profit.

C. ABBOTT.

J. BAYLEY.

G. S. HOLROYD.

ROBINSON v. ELSAM.—p. 661.

An attorney brought his action for his bill of costs, and held the defendant to bail for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for so doing: Held, that this was a case within the 48 Geo. 3, c. 46, s. 8; and that if not within the statute, still the court, in the exercise of its jurisdiction over its officers, would compel an attorney to pay costs under such circumstances.

THE plaintiff, an attorney, had, on the 19th March, 1821, delivered to the defendant his bill for business done, amounting to 521*l.* 1*s.* 3*d.* On the 21st April the plaintiff arrested and held the defendant to bail for 500*l.* and upwards, and declared in the action. On the 14th May, a Judge's order was obtained for referring the bill of costs to the Master, to be taxed, upon the defendant's undertaking to pay the amount that should appear due on the taxation, and the costs of the action, the defendant being at liberty to deduct any payments made on

account. The Master taxed the bill at 299*l.* 16*s.* 6*d.*; and, after giving the defendant credit for 15*l.*, there remained a balance due to plaintiff of 284*l.* 16*s.* 6*d.*; and the costs of the action to recover the bill were then taxed at 13*l.* 15*s.* 7*d.* The plaintiff having demanded payment of the whole sum, without giving the defendant credit for a cross demand which he had against the plaintiff, the former did not pay the amount, and on the 9th November he was taken upon an attachment for non-payment of the money, and conveyed to Dover Castle. The plaintiff then issued a habeas corpus to bring him to London, and caused him to be committed to the King's Bench prison, and he then paid the sum awarded by the Master's allocatur, together with the costs of the attachment and the habeas corpus. A rule nisi was obtained in last Hilary term, calling on the plaintiff to show cause why so much of the order of the 14th of May, and of the rule of court founded thereon, as respected the costs of the action, should not be discharged, and why the plaintiff should not refund to the defendant the sum of 13*l.* 15*s.* 7*d.*, allowed and paid him for the costs of the action, and why the plaintiff should not pay to the defendant his costs of this action, to be taxed by the Master, and also the costs of the taxation of his bill of costs, and why it should not be referred to the Master to tax the plaintiff's charges, for the costs of the attachment, and why the plaintiff should not refund what had been overpaid on that account, together with the costs of the writ of habeas corpus. Upon this rule coming on in last term, the matters of the rule were referred to the Master, and he, thinking that the plaintiff had no reasonable or probable cause for arresting the defendant for 500*l.*, directed the plaintiff to refund to the defendant the costs of the action, and to pay to the defendant 9*l.* 7*s.* 10*d.* as his taxed costs of the action and the costs of the taxation, and 2*l.* 10*s.* as overcharged for the attachment, together with the sum of 16*l.* 16*s.*, the costs of the habeas corpus, and 19*l.* 18*s.* 6*d.*, the costs of that application. A rule nisi had been subsequently obtained for the Master to review his report, so far as the same directed the costs of the action to be paid by the plaintiff to the defendant, instead of by the defendant to the plaintiff, and the costs of the application.

Marryat now showed cause. It must be now taken for granted, after the report of the Master, that the plaintiff had not any reasonable or probable cause for holding the defendant to special bail for the amount of 500*l.* The plaintiff has not recovered the amount of the sum for which the defendant was arrested and held to special bail, and, therefore, this case falls within the very words of the 43 Geo. 3, c. 46, s. 3. It is true, that the amount was not recovered by verdict, but that is not necessary; for where the amount of the debt was ascertained by the award of an arbitrator, it was held to be a sum recovered within the meaning of the act.* In this case the only mode of ascertaining the amount due was by taxation.

Scarlett. The statute only applies to those cases where the amount recovered is ascertained by verdict. *Cammack v. Gregory*, 10 East, 525, and *Rouveroy v. Alefson*, 13 East, 90. In the case cited from

* Tidd's Pr. 1018, 6th ed., cites *Neale v. Porter*, K. B. 44 Geo. 3.

Tidd's Practice, a verdict was taken subject to an award, and when the award was made, the verdict was entered accordingly; so that the sum ultimately recovered might be considered as recovered by verdict. Here the sum is recovered by the Master's allocatur. At all events, the defendant is too late in his application. He ought to have applied before the costs were paid.

ABBOTT, C. J. We must now assume, after what the Master has done, that the plaintiff had not any reasonable or probable cause for holding the defendant to bail for 500*l*. It is unnecessary to decide whether this case be within the statute, because the plaintiff, here, is an attorney. It appears to me to be a case certainly within the spirit and object of the statute; and that being so, I think we shall do well, in the exercise of that jurisdiction which we have over the officers of the court, to compel the plaintiff to pay the costs of the action.

BAYLEY, J. I think that this case falls strictly within the act of parliament. The plaintiff here arrested the defendant for 500*l*. and recovered only 284*l*. Now it has been decided to be a case within the statute, where the sum recovered is ascertained by the award of an arbitrator. Here the sum recovered was ascertained by the Master's allocatur; the suit then was at an end; and all the legal consequences that result from the termination of the suit must follow; one of which is, that the plaintiff having held the defendant to bail for a larger sum than is actually due, and not having any probable cause for so doing, must pay the defendant his costs.

BEST, J.* I am clearly of opinion that this case falls within the words and spirit of the act of parliament; for the plaintiff has not recovered the amount of the sum for which he held the defendant to bail, and he had not any reasonable or probable cause for causing him to be held to bail for 500*l*.; and the express object of the statute was to prevent frivolous and vexatious arrests.

Rule discharged.

* Holroyd, J., had left the Court.

The KING v. WILLIAM CLARKE.—p. 665.

The proviso in 55 G. 3, c. 51, s. 1, stating that that act shall not give any jurisdiction to the justices of the county over any places situate within the limits of any liberties or franchises having a separate jurisdiction, is confined to franchises having a separate jurisdiction co-extensive with that possessed by the county justices; and, therefore, where the justices of the city of B. had no jurisdiction by charter to try felons, it was held that the city of B. was liable to the county rate.

INDICTMENT against defendant, a constable within the city of Bath, for not obeying an order of the sessions of the county of Somerset, requiring him, as such constable, to issue out his warrant to the overseers of the poor of the parish of St. James, in that city, directing them to collect and levy the sum of 61*l*. for the purposes of the county rate. Plea, not guilty. At the trial, before HOLROYD, J., at the last Dorsetshire assizes, a verdict was found for the crown, subject to the opinion of this Court upon a case which stated, that the city of Bath

was an ancient city, and had in it a body corporate, and possessed many franchises, partly by prescription and partly by charter. By a charter, in 1590, Queen Elizabeth granted to the mayor, &c., of the said city a prison for keeping all prisoners, committed in any sort howsoever, within the liberties of the said city or the precincts thereof, for any matter, cause, or thing, which ought to be inquired, prosecuted, punished, or determined in the said city: but if any person should be committed for any cause which ought not to be so inquired, &c., then the mayor, &c., *should have power to commit such persons to the common gaol of the county of Somerset.* It further provided, that the mayor, &c., should have power to arrest and examine all felons, thieves, and other malefactors, found within the city, and commit them to the county gaol. By another clause, the bailiffs of the city were to have returns of writs, and of all attachments, arising within the city; with a non-intromittas clause to the sheriff of the county. By another, the mayor, &c., were to have cognisance of all pleas and actions personal, and the mayor, recorder, and two of the aldermen, were made justices of the peace, and any three or two of them (of whom the mayor or recorder was to be one) were to have full power to inquire, by the oath of honest and lawful men, &c., of all trespasses, forestallers, regraters, and extortions, committed in any manner or sort howsoever in the said city, &c., and of all those who go or ride armed in conventicles, and of those who lie in wait to maim or kill, &c., and of all such as offend in the abuse of weights and measures, and in selling of victuals; and of all labourers, mendicants, vagabonds, and all other persons whatsoever, who should offend in the said city: and to take view, control, and inspect all indictments whatsoever concerning the premises, and to hear and determine the same, in such manner as the justices of the peace in the county might hear and determine such indictments taken before them; and also that they should have power to inquire, hear, handle, judge, and determine of all and singular other trespasses, offences, defects, and articles, which belong or appertain to the office of a justice of the peace, committed within the city of Bath, as fully and largely, and in as ample manner and form, as any other justices of the peace in any other county of England have power to hear and determine: so that the justices of the county of Somerset, or any of them, should not, at any time thereafter, intrude themselves to meddle with any the aforesaid things, causes, matters, defects, offences, or other articles, &c., arising within the said city, but only in default of the mayor, &c. The charter then ordained that the common clerk of the city should be clerk of the peace there; that the mayor should be the coroner, and that the mayor, aldermen, &c., should appoint a chamberlain and receiver, and constables and other inferior officers, within the city. These charters were accepted, and are still in force. The boundaries of the city, as described in the charter of Elizabeth, contained within them three entire parishes, namely, the parish of St. Peter and St. Paul, the parish of St. Michael, and the parish of St. James; and they contain also a part of the parish of Walcot, which latter parish, although partly within and partly without the city, has but one set of overseers, and one poor's rate for the whole parish. At the time of issuing and

delivering the warrant to the defendant, the mayor, recorder, and two aldermen of the city, duly nominated and elected, were justices of the peace in and for the said city, pursuant to the charter of Elizabeth, and there was no default of a mayor, recorder, and two aldermen, as such justices, and the quarter sessions were regularly held. The corporation, out of their own funds, have built and repair the bridge within the city, called The Bath Bridge, and also the city gaol, of which they appoint the chaplain, the surgeon, and the gaoler, and pay their respective salaries, and the expenses of the prisoners committed thereto: they also built and repair the guildhall, where the city sessions are regularly held, under the charter of Elizabeth, and where all the public business of the city is transacted; they also pay the expenses of committing and conveying prisoners to the county gaol for trial for felonies and other offences committed within the city, and which are not cognisable by them, all expenses of a like nature incurred without the city being paid out of the county rate. The licenses of all public-houses within the city are also granted by the city justices; the city has its own coroner; the fees and expenses of his inquests, and the expenses of passing vagrants, are respectively paid by the entire parishes, and also by that part of the parish of Walcot which lies within the city, over which the city justices exercise the same power as they do over the entire parishes. Before making the county rate in question, and delivering the warrant to the defendant, the county justices had never rated the city of Bath, nor any of the entire parishes lying within the same, to the county rate; but they have rated the entire parish of Walcot to the county rate, without making any distinction between the in part and out part. Previously to the passing of the act 58 G. 3, c. 70, the expenses for the prosecution of felons for offences committed within the city, were paid by the treasurer of the county of Somerset, out of the general rates of the county; but immediately after the passing that act, and from thence until the making of the rate in question, many orders were made at the sessions and assizes on the churchwardens and overseers, &c., for the payment of the expenses of prosecutions of felons committed within the city, all of which said orders were duly obeyed; but as soon as the rate was made, which included all the parishes within the city of Bath, such orders were discontinued, and the expenses of such prosecutions were again ordered to be paid out of the rates of the county at large. The county justices, until the making the county rate and warrant before mentioned, had never in any respect interfered, or attempted to interfere in anything that appertained to the office of justice of the peace, arising within either of the said entire parishes, or within the in part of the parish of Walcot, but they have rated the parish of Walcot, without making any such distinction as aforesaid. The number of prisoners sent to the county gaols by the city justices is considerable, and the keeping and maintaining such prisoners, after they are delivered by the city officers at the county gaols, and the charges of their conveyance to and from the assizes and quarter sessions, together with the expenses attendant on carrying their several sentences into execution, have always been and still are paid out of the general county rate.

Adam, for the Crown. The city of Bath is within the jurisdiction of the county magistrates, for, by the charter, the city magistrates have only the power of trying trespasses, forestallers, regraters, and other extortions. These were the offences cognisable in the court of the leet, and the rule is, that in construing such words, they cannot be held to include felonies, which are offences of a higher nature. In general, whenever a power of holding quarter sessions is given by charter, the power of trying felonies is expressly there given, as appears from the charters of Nottingham, Derby, and Leicester, set out in *James v. Green*, 6 T. R. 280, *Weatherhead v. Drewry*, 11 East, 169, and *Bates v. Winstanley*, 4 M. & S. 429. Then if so, the city of Bath is not a separate jurisdiction, within 55 Geo. 3, c. 51. He was then stopped by the Court.

Gaselee, contra. Here, by the charter, the city magistrates have an exclusive jurisdiction as justices of the peace; for the words are, that they are to inquire, hear, handle, judge, and determine of all and singular other trespasses, offences, defects, and articles, which belong to the office of a justice of the peace, as fully and largely, and in as ample a manner as any other justices of any county in England. The right of trying felony is not incidental to the commission of justice of the peace, and as justices of the peace alone they have no such power; it arises from the clause of oyer and terminer inserted in the commission. If the commission simply stated that A. B. should be a justice of the peace for the county of Somerset, he would not thereby have any such power. Here the justices for the city have an exclusive jurisdiction, for within their limits the county justices have no power, as justices, to interfere. The city of Bath is, therefore, within the limits of a franchise, having a separate jurisdiction, and falls within the proviso in the first section of the 55 Geo. 3, c. 51. By the 13 Geo. 2, c. 18, s. 7, which is nearly copied verbatim in the 55 Geo. 3, c. 51, s. 24, where franchises have separate commissions, and are not subject to the jurisdiction of the commissions of the peace for the county, they are to be allowed to collect rates in the nature of county rates; and in *Weatherhead v. Drewry*, 11 East, 169, it was held, that they might make a rate for the town of Derby under this provision. [ABBOTT, C. J. In the Derby charter the justices had a power of oyer and terminer as to felony.] Here the city of Bath has a separate commission, and is not within the jurisdiction of the commission of the peace, using that expression in its strict sense. The 58 Geo. 3, c. 70, s. 9, is also strongly in favour of the defendant, and may be considered in some respects as a legislative exposition of the 55 Geo. 3, c. 51. For it is enacted, that all the costs, charges, &c., attending prosecutions for felony, shall be raised by a separate rate in those places which are there described as being "cities, towns corporate, and places which do not contribute to the payment of the county rate, and have no town rate or public stock." Now, Bath comes exactly within this description according to the statement in the case. [ABBOTT, C. J. That act only provides for the expenses of the trial. The costs of maintenance in gaol, and other incidental expenses, are still unprovided for. BAYLEY, J. We must construe the 55 Geo. 3, c. 51, as if the case had come on before the

58 Geo. 3, c. 70, was passed. This latter act cannot be taken as a legislative exposition of the former. If it were so, it would not, in this case, for the reason pointed out by my Lord Chief Justice, give a remedy coextensive with the evil.] Here the justices for the county could issue no process within the limits of the city, *Talbot v. Hubble*, 2 Str. 1154. As, therefore, the ordinary jurisdiction of justices of the peace was taken away from the county magistrates, this must be considered as the case of a franchise having commission of its own, and not subject to the jurisdiction of the commission of the peace for the county. In that case it comes within the 24th section of the 55 Geo. 3, c. 51.

ABBOTT, C. J. I am of opinion, that the city of Bath is liable to contribute to the county rate, and that in this case, our judgment should be for the crown. The question depends on the construction to be put upon the 55 G. 3, c. 51, s. 1, by which a power is given to the justices of the county, to tax every parish, township, and other place, whether parochial or extra parochial, within the respective limits of their commissions. The first question, therefore, which arises, is whether the city of Bath be within the limits of the jurisdiction of the justices of the county of Somerset. Now, it appears from the statement of the case, that they alone have the power of trying felonies committed within the city. It is, therefore, clear that Bath is within the limits of their jurisdiction. Then comes the proviso, which states that the act shall not give any jurisdiction to the justices of the county over any places situated within the limits of any liberties or franchises having a separate jurisdiction. Then is the city of Bath a franchise, "having a separate jurisdiction?" I think that these words must mean, "having a separate jurisdiction coextensive with that possessed by the county justices." Here it is clear that the justices of Bath have no such jurisdiction: for their jurisdiction is by the charter of Elizabeth confined to such trespasses, offences, defects, and articles, which do or may belong to the office of a justice of the peace. It is clear from these words, that it does not extend to felony, and, therefore, is not coextensive with that of the county justices. Then, if so, the case does not fall within that part of the proviso; but the proviso goes further, and speaks of places which before the act were "subject to rates in the nature of county rates, or which were exempt from the rates of the county, either in the whole, or in part, under some grant, charter, or local act of parliament." Now it is clear from the case, that the city of Bath, previously to the 55 G. 3, was not subject to any rate in the nature of a county rate, nor do I find it stated that it was legally exempted by any grant, charter, or local act of parliament. Upon the whole, therefore, I am of opinion that the city of Bath does not fall within the proviso. Nor does the 24th section, as it seems to me, carry the case any further, for that clause only applies to such franchises as have commissions of the peace within themselves, and are not subject to the jurisdiction of the commission of the peace for the counties in which they lie. Here, the city of Bath was, in my opinion, subject to that jurisdiction, and our judgment, therefore, must be for the crown.

BAYLEY, J. I am of the same opinion. The county rate is appro-

priated to certain specific purposes, and the object of the statute 55 G. 3, c. 51, being to have a fair and equal rate, it seems to me, that all ought to contribute to it who derive a benefit from it. Now, one of the purposes of the rate is to maintain felons in gaol, and, in this case, persons imprisoned for felonies committed within the city of Bath, are maintained out of the county rate for Somersetshire, and according to justice, therefore, the city of Bath ought to contribute. The first question is, whether Bath be within the limits of the jurisdiction of the county magistrates. Now *prima facie* their jurisdiction is coextensive with the county, and if they are excluded from any franchise to a limited extent, they still continue to have jurisdiction there, so far as they are not expressly excluded. From the statement of the case, it is clear that the county justices have a jurisdiction within the city of Bath, as far as the trial of felonies there committed. Then does Bath come within the proviso? I think not. The separate jurisdictions there mentioned, mean such as are coextensive with all the purposes for which the county rate is payable, and extend to all the crimes over which the county magistrates have jurisdiction. But that is not the case here. There ought, therefore, to be judgment for the crown.

HOLROYD, J., concurred.*

Judgment for crown.

* Best, J., was in the Bail Court.

DOWNES v. RICHARDSON and Others, Assignees of the Estate and Effects of EBENEZER THOMPSON, a Bankrupt.—p. 674.

Three persons joined as drawer, acceptor, and first endorser, in making an accommodation bill; and it was afterwards issued for value to J. S. Previously to its being so issued, its date had been altered: Held, that the acceptor, having assented to the alteration when he was informed of it, it was no answer to an action on the bill against him, that the bill had been so altered without the consent of the drawer and first endorser, and that a fresh stamp was not necessary in consequence of such alteration, the bill having been altered before it was issued in point of law. An accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law.

THIS was a feigned issue directed by the Vice-Chancellor, to try the question, whether Ebenezer Thompson, before and at the time of his bankruptcy, was indebted to the plaintiff upon a bill of exchange, bearing date the 16th of March, 1818, drawn by one Rains upon, and accepted by the bankrupt for 1000*l.*, payable to Rains' order, six months after date, and endorsed by him to the plaintiff. At the trial before ABBOTT, C. J., at the London adjourned sittings after Hilary term, 1820, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

The bill of exchange appeared to bear date the 16th March, 1818, and purported to be endorsed by one Joseph Lachlan, as well as by J. S. Rains, and the signatures of Rains as drawer and endorser, of E. Thompson as acceptor, and of J. Lachlan as endorser of the bill, were proved to be of the hand-writing of those parties respectively. Rains,

Thompson, and Lachlan had been some time before the drawing of this bill, concerned together in bill transactions; Rains being generally the drawer. The bills, to which they were parties, were chiefly for the accommodation of Rains, but not solely; Lachlan and Thompson had also some accommodation from them. As the bills became due, Rains was to draw and provide for them; for the bills accepted by Lachlan, he was to draw on Lachlan, and for the bills accepted by Thompson, he was to draw on Thompson. When the bills became due, Rains provided for them by redrawing. The bill in question was drawn, accepted, and endorsed in the course of these dealings. The body of the bill was written by one James Sims, who was employed to assist Rains in his cash transactions; Sims was not employed by Lachlan or Thompson. It had been agreed between the parties, that they would not accept bills unless they came through Sims. The bills were sometimes accepted in blank. After they were filled up and accepted, they were sometimes in the custody of Sims, and sometimes Sims handed them to Rains, and either Rains or Sims, as the case might be, handed them to one Becher, a commissioned agent or broker, for the purpose of their being delivered out to the world, and Becher usually purchased goods with them. The bill in question was filled up and dated by Sims, on the 6th March, 1818, and was then accepted by Thompson, and endorsed by Rains and Lachlan. On the 9th March, Sims wrote and delivered to Thompson and Lachlan written statements, mentioning the particulars of the bill, and that it would fall due on the 9th September following. The bill at that time was dated March the 6th. Immediately after the 9th of March, Sims delivered the bill to Rains, and the latter delivered it to Becher. The bill was delivered on the 10th of April, by a clerk of Becher's, to one Howell, in payment for goods sold and delivered by him to Becher. At that time it bore date, March the 16th. It was afterwards received by the plaintiff from Howell bona fide, and for a valuable consideration. Lachlan never gave any authority for the alteration, which was not in the hand-writing of Sims. On the 13th April, a note was sent by Sims to Thompson, stating the periods when several bills received from him on the month of March would become due, and, among others, that the 1000*l.* in question would become due on the 19th of September. Rains and Becher left this country for America in the month of April, and have not since returned; and about two or three days after Rains left England, and before the bill became due, Thompson called upon Howell, who then continued the holder of it, to answer some inquiries which had been made respecting it. Howell's clerk asked him if it would be paid, and he said, that it would. The jury found the following facts specifically upon questions submitted to them by the Lord Chief Justice: That the date of the bill had been altered after it had been drawn, accepted, and endorsed by Rains, Thompson, and Lachlan; that the alteration was without the consent or knowledge of Lachlan; that the alteration was without the previous assent of Thompson; that Thompson being informed of the alteration, afterwards assented to it while the bill remained in Howell's hands. The case was now argued by

Tindal, for the plaintiff. The bill, before it was issued to Howell, a bona fide holder, was not a valid security; and, therefore, any alteration before that time does not avoid it. It is clear, that an accommodation bill may be altered before it is negotiated. In *Bowman v. Nichol*, 5 T. R. 537, it must be taken from the statement, that the bill was given for value; and if so, the alteration was made after it had been accepted and delivered to the drawer, and when it was therefore an available security. In *Cardwell v. Martin*, 9 East, 190, the respective bills were considered to be issued as soon as the exchange of the acceptances had taken place. So, too, in *Bathe v. Taylor*, 15 East, 412, the bill was accepted for a debt which the acceptor owed to the drawer, and was, therefore, a valid security. So, in *Walton v. Hastings*, 4 Camp. 223, the bill was accepted on account of a bona fide debt, due from the drawer, and Lord ELLENBOROUGH expressly states, that it was an existing valid instrument before the alteration. Now, here, as between Lachlan, Rains, and Thompson, this was a mere accommodation bill. No action was maintainable upon it until it passed into the hands of Howell, and before that time the alteration had taken place.

Campbell, contra. 1st, At common law no action could have been maintained by Downes against Thompson upon this bill. 2dly, If it was an accommodation bill, it required a new stamp. 3dly, This was not an accommodation bill. 4thly, It was not altered until after it had been negotiated. As to the first point, no action could be maintained at common law by the plaintiff, as endorsee, against the defendant, as acceptor of this bill. It was originally dated the 6th March, and was altered, without the consent of Rains, the first endorser, or of Lachlan, the second endorser. Now, in an action by Downes, it would have been necessary to state in the declaration, that Rains, the payee of the bill, had endorsed it. Rains and Lachlan endorsed the bill while it bore date the 6th March, and, therefore, they never endorsed a bill bearing date the 16th March; and, consequently, the allegation in the declaration, that they endorsed a bill dated the 16th March, would not be supported. 2dly, But even if this were an accommodation bill, as between Rains, Thompson, and Lachlan, still, as it once existed as a perfect instrument, according to the intention of all the parties, it became, by the alteration, a new bill, and required a fresh stamp. It is true, that, in *Kershaw v. Cox*, 3 Esp. 246, it was held, that where a bill, by mistake, was originally made payable to the defendant or his order, it might be altered without a fresh stamp. But, here, there was no mistake: the instrument was perfect, according to the original intention of the parties. In *Calvert v. Roberts*, 3 Camp. 343, it was expressly held, that an accommodation bill, payable to the drawer's order, cannot be altered after acceptance and before it is actually negotiated. 3dly, This was not an accommodation bill; it was a bill accepted by Thompson in the usual course of dealing between the parties; and it is stated as a fact, that the bills were chiefly for the accommodation of Rains, but not solely; Lachlan and Thompson had some accommodation from them. Then, if they derived any benefit

from the bills, the quantity of benefit is immaterial; and it must be taken, from the facts stated in the case, that this bill was accepted by Thompson in return for some other bills which Lachlan had accepted; and, if so, then this must be considered as the case of an exchange of acceptances, and it falls within the principle of the case of *Caldwell v. Martin*, 9 East, 190. 4thly, At all events it had been negotiated before it was altered. Thompson did not give his assent to the alteration till the bill was in the hands of Howell, a bona fide holder for value. The legal effect, therefore, is the same as if Thompson had then, with his own hand, altered the date from the 6th to the 16th; in which case the bill would unquestionably have been void.

ABBOTT, C. J. I am of opinion that the plaintiff is entitled to recover. If we were to yield to the objection on the part of the defendant, we should open a door to great fraud. At common law it is clear that this would be a valid instrument, as against the acceptor, having been altered by his consent; but the difficulty arises from the act of parliament, which requires that every bill of exchange shall have a stamp. The question then is, whether this alteration made it a new bill? Now, undoubtedly, when an accommodation-bill has the names of the different parties written upon it, it is, in some sense of the word, a bill of exchange; but it is utterly unavailable as a security for money, until it is issued to some real holder for a valuable consideration. But it is said that this was not an accommodation-bill. Now it appears there were three persons concerned together, and acting different parts in these bill transactions: one of them drew, another endorsed, and a third accepted these accommodation-bills; and it appears that Sims, a clerk, was principally intrusted with the possession of this paper for the benefit of all. This, therefore, is nothing like the exchange of paper, in *Cardwell v. Martin*, referred to in argument. It seems to me, therefore, on the facts of this case, that this was an accommodation-bill, in the strictest sense of the word, and that the original parties to it had no right of action inter se. This being the nature of the instrument, it follows that till it was negotiated it was an unavailable instrument; and that it first became a bill of exchange when it was issued to Howell for a valuable consideration. At that time, however, it had been altered, and on the 13th of April it appears, that, in a letter from Sims to Thompson, the latter was informed of such alteration having been made. Under these circumstances, and with this knowledge, Thompson is asked by Howell's clerk (the bill then being in Howell's hands) whether the bill would be paid; and Thompson then stated that it would be paid, thereby assenting to the alteration that had been made. I am, therefore, of opinion that, as against him, it is a valid instrument, and that he cannot now object to the alteration. For these reasons, it seems to me that the plaintiff is entitled to the judgment of the Court.

BAYLEY, J. I am of the same opinion. The alteration of an instrument vacates it, but that must be taken with this qualification, that the alteration is without the consent of the party to be bound. But here, Thompson has assented to the alteration, and, therefore, he cannot object to it on this ground. Then the question arises as to the provisions

of the stamp-act. Now, if an alteration be made before a bill is issued, a fresh stamp is not necessary. Then when is a bill issued? I am of opinion that it issued as soon as there is some person who can make a valid claim upon it; but if it remains in the hands of the original drawer, even with names upon it, under such circumstances as that, he cannot have any legal claim upon those persons, the bill is not issued. Here it was clearly an accommodation-bill drawn by Rains upon Thompson, and endorsed by Lachlan, and those parties could not have a valid claim upon it *inter se*. It was, I think, not issued until the 10th of April, when it was passed to Howell; but at that time the alteration was made. This bill, therefore, was altered before it was issued, and no new stamp was necessary. But it is said, that, inasmuch as Thompson did not assent to the alteration until after the bill was in Howell's hands, he is discharged. The fallacy is in considering the assent to the previous alteration, as an alteration of the bill *de novo* at that time; but that is not so. The alteration had vacated his acceptance, and gave him a right to say, "my name is off the bill;" but he may waive the benefit of such an objection, and I think he has done so, for I consider his assent as equivalent to a new acceptance.* I think, therefore, that the plaintiff is entitled to judgment.

HOLROYD, J. I am of the same opinion. Independently of the stamp-act, it is clear that the acceptor would be liable; for when he assented to the alteration, it is as if his acceptance had been originally made subsequently to that alteration; for his assent operates as a *parol* acceptance of the bill. As to the other point, I am of opinion, that a fresh stamp was not necessary, because no one could have maintained an action upon the bill, until it came into the hands of Howell.

BEST, J. I am of the same opinion. It seems to me, that if this objection were to prevail, we should be encouraging the fabrication of accommodation paper; for we should be allowing parties to take advantage of alterations made by themselves. Here, at the time when the alteration was made, the bill was a perfect bill in form, but it did not constitute a valid contract between the parties. A bond is, in form, a perfect instrument before delivery; but still an alteration made before delivery will not vitiate it. So, again, in the case of an acceptance, we held, in *Cox v. Troy*, that it may be cancelled before the bill is issued. Here the alteration was made before the bill was issued to Howell, and it was afterwards assented to by Thompson; and I think he is bound by it.

Judgment for the plaintiff.

* If the bill had been made after the passing of 1 & 2 G. 4, c. 79, s. 2, which requires the acceptance to be in writing, could the plaintiff have recovered?

BONNER v. WILKINSON, Executor of W. WILKINSON,
Deceased.—p. 682.

In an original writ the defendant was described as T. B. of C. in the county of N. Upon a writ of error, brought to reverse the outlawry, the error assigned was, that T. B. was not before or at the time of the original writ, of or conversant in C. aforesaid, and that there was not any town, hamlet, or place of the name of C. in that county. Plea to this assignment of errors, that plaintiff prosecuted his writ with intent to declare upon a bond made by the defendant, by which he was described as T. B. of C. in the county of N.: *Held*, that this was an estoppel.

THIS was a writ of error, brought to reverse the judgment of outlawry. In the original writ the defendant was described as "Thomas Bonner, late of Callerton, in the county of Northumberland." The errors assigned were, that the defendant was described in the original writ by the name and addition of Thomas Bonner, of Callerton, in the county of Northumberland, yet that he was not, before or at the time of issuing the original writ, of or conversant in Callerton aforesaid, and that there was not any town, hamlet, or place of the name of Callerton in that county; although there were three distinct townships, called Black Callerton, High Callerton, and Little Callerton, in that county; and that the said T. Bonner was, at the time of issuing the writ, of or conversant in the township of High Callerton, and that he was not so described in the original writ; and, therefore, there was no addition in the original writ of the town, hamlet, or place, of which T. B. was of or conversant. To this assignment of errors the plaintiff pleaded, by way of estoppel, that he prosecuted his writ with intent to declare thereon against Bonner upon a bond made by him, in the lifetime of the testator, on the 30th March, 1803, and by which the defendant was described as Thomas Bonner of Callerton, in the county of Northumberland. To this plea there was a demurrer.

Littledale, in support of the demurrer. The statute 1 Hen. 5, c. 5, requires, in every original writ on which an exigent shall be awarded, that, to the names of the defendants, additions shall be made of their estate or degree, or trade, and of the towns or hamlets, or places, and the counties of which they were or are, or in which they are or were conversant. And if, by process upon the original writ, in which the said additions be omitted, any outlawries be pronounced, that they be void. Now, in the original writ in this case, the defendant is not described as of any town or hamlet; for the Court cannot intend Callerton to be a vill. *Bowes v. Howe*, 5 Taunt. 32. It may be the name of the house of the defendant, but that will not satisfy the words of the statute; for the term "place," coupled with "hamlet" and "vill," must mean something more than a mere house. But it is to be contended, that by the bond he is estopped from taking this objection. In Rolle's Abr. 683, it is laid down, "if a man be bound in obligation by name of J. S., of D., yet he may say that there are two D.'s in the same county, scilicet, &c., for this stands with the deed, for he acknowledges the obligation, and more; and 14 Hen. 6, 8, is cited. So, in Bro. Abr. tit. Estoppel, pl. 16, debt upon a bond against B., late of D.,

he said that he was never dwelling at D.; to this the plaintiff said, that to this he should not be received, for he is bound by the name of J. B., of D.; and the best opinion was, that the obligee is not estopped in this point, for nothing is effectual for this purpose but the name and the surname; 33 Hen. 6, 10. And in folio 38 it is said there, that anno 31 it was adjudged no estoppel. In Bro., Estoppel, pl. 178, it is laid down, that "where a man says, in avoidance of outlawry, that he is of W., absque hoc, that he was dwelling at D., he shall not be by this estopped to say no such vill as D. in the same county; for the confession of a thing which is not material, shall not be estoppel: and 22 Edw. 4, 38, is cited. And in pl. 156, this case is stated: Debt against R. H., of E., in the county of O., upon obligation, the defendant said that in the same county are two E.'s, Over E. and Nether E., and none without addition; and the other would have estopped him by the obligation which shall be intended his deed, till it be disproved. And, by the best opinion, it is no estoppel, for it stands with the obligation; for he says so much and more; but he shall be estopped to say, no such vill, hamlet, or place, known in the same county; and 5 Edw. 4, 46, is cited.* So, in pl. 104, in debt against J. S., of D., the defendant said, that the day of the writ purchased he was dwelling at S., and not at D., judgment of the writ; and the plaintiff pleaded the obligation for estoppel, because he was bound in the sum by the name of J. S., of D. Per Prissot. This is no plea; for he may say, not his deed, and, therefore, no estoppel; and so was the opinion of the Court; but it seems that the reason of Prissot is not material, for to every indenture which is pleaded for estoppel, the party may say, non est factum; yet it is a good estoppel prima facie; but it seems to me the reason is, inasmuch as it may stand with, &c., for it may be that he dwelt at D. at the time of making the obligation, and that he dwelt at I. on the day of the writ purchased; and 37 Hen. 6, 5, is cited.

Tindal, contra. The defendant below is estopped by his bond; the statute requires that the addition shall be of the town, hamlet, or place, and the latter word must imply something inferior to a town or hamlet. It cannot be in the mouth of the defendant to say that his bond does not contain his true description. And in Jenkins, 163, pl. 12, this case is stated: A. is bound to B. in an obligation; A. is named of Dale, without an addition; B. sues A. upon this obligation; A. shall not be received to plea that there is Over Dale and Nether Dale; for the obligation is otherwise, and he shall not be received to contradict his own deed, but he shall be estopped by it: and this is said to have been decided by the Justices of both Benches: and 2 Rich. 3 is cited. And in Fitzherb., Estoppel, pl. 81, the same point is stated to have been decided by the Judges of both Benches. This, therefore, appears to be a solemn decision, upon conference between the Judges of the two Courts, that this is a good estoppel; and Rastall's Entries, tit. Debt in Courts below, pl. 159, b., is to the same effect. Besides, the Court cannot assume Callerton to be only a house, because the defendant might have pleaded it not to be a vill.

* See Bro. tit. *Estoppel*, pl. 69, 172, 214.

ABBOTT, C. J. It is certainly true that a party cannot, by his own private instrument, defeat the object of an act of parliament, but he may thereby waive a provision intended for his own benefit. The place of abode serves to distinguish the individual to be outlawed from other persons of the same name, and therefore is an important part of his description. It appears from the cases cited, that the Court held, soon after the passing of the act, 1 Hen. 5, c. 5, that the execution of a bond, in which the party was described as of a given place, did not stop him from saying that he was not of that place. It seems, however, that in the reign of Rich. 3, on mature consideration, the judges of both courts, upon conference, overruled the judgments previously given, and determined the better construction of the statute to be, that a party should not be allowed to say that he was not of the place of which he had described himself in the bond; and, in my experience, I have always considered that as a settled rule of law. I think, therefore, the plea to the assignment of errors is a good estoppel, and consequently that the judgment of outlawry must stand.

HOLROYD, J.* I think this outlawry ought to stand. It appears from the authorities cited in argument, that in the time of Rich. 3, the judges of both courts, upon conference, decided, contrary to former authorities, that a party should be estopped from saying that he was not of the place of which he had described himself to be by his own deed, and from that time it seems to me that the law has been considered as settled; for, otherwise, there would have been subsequent cases on the subject. The object of the statute was, that it should appear by the description in the indictment or writ, what person of the particular name it was that was intended to be outlawed. Now, that object would be better answered by describing the person as of a particular house, than as of a ville or hamlet, for it is less probable that there should be two persons of the same name in the smaller than in the larger place.

BEST, J., concurred.

Judgment of outlawry affirmed.

* Bayley, J., was absent.

HALL v. DOE, on the Demise of SURTEES and Another. p. 687.

Where premises were mortgaged in fee, with a proviso for reconveyance, if the principal were paid on a given day, and in the mean time, that the mortgagor should continue in possession; upon special verdict, it was found that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury either that interest had or had not been paid by the mortgagor: *Held*, that upon this finding, it must be taken, that the occupation was by the permission of the mortgagee; and, consequently, that although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations: *Held*, also, that an entry is not necessary to avoid a fine levied by the mortgagor.

THIS was a writ of error, brought to reverse a judgment obtained in ejectment in the Court of Pleas at Durham. The declaration was

on a demise by W. Surtees, on the 8th July, 1817, of an undivided third part of certain premises habendum from 7th July, 1817, for seven years, &c. A special verdict was found, stating the following facts. On the 1st May, 1780, one Thomas Labourne being seized of the tenements in question, in fee, mortgaged them to Auburn Surtees in fee, for the sum of 800*l.* with the usual proviso for reconveyance, if Labourne should pay A. S. the 800*l.* with interest, on the 3d November, 1780, and that Labourne should occupy the premises until default. A default having been made, A. S. thereby became seized in fee by law of the premises, but never entered, and Labourne continued to occupy them until his death. A. Surtees, on the 30th September, 1800, died intestate, and the right to the premises in question descended to W. Surtees, his heir at law. Thomas Labourn died on the 30th June, 1804, and the estate descended to J. Labourn, his son and heir at law, who entered and occupied part of the premises in question, until 1807; the residue being occupied by his mother till her death, in 1813. J. Labourn, in October, 1806, conveyed the premises for a valuable consideration to Michael Hall, the defendant below, and on the 8th October, 1806, a fine was levied with proclamations in the Court of Pleas, in the county palatine, of Durham, of the premises in question, to the use of Michael Hall. M. Hall, on the 1st August, 1807, entered and occupied one messuage part of the premises in question, into which Joseph Labourn had entered upon the death of Thomas Labourn, and continued to occupy the same; and immediately after the death of Elizabeth Labourn, in September, 1813, Michael Hall entered into possession, and occupied the residue of the premises in question. W. Surtees, on the 13th July, 1813, demanded of Michael Hall the possession of the same, which he refused to deliver up.

Littledale, for the plaintiff in error. William Surtees is not entitled to recover, because he has not brought his ejectment in time. His right of entry accrued on the 3d November, 1780, when there was default in the payment of the principal and interest. If the interest had been paid from time to time, then indeed the mortgagor could not be considered as holding adversely to the mortgagee. *Hatcher v. Fineaux*, 1 *Ld. Raymond*, 740. But that fact is not found. In *Sir Moyle Finch's case*, 2 *Leon*. 143, it is laid down, that a lessee for years, holding over his term, becomes a tenant at sufferance, and shall not pay rent; for it is the folly of the lessor to suffer the lessee to continue in the possession of his land after his term; and it is clear, in this case, that the money not having been paid at the appointed time, the mortgagor was tenant by sufferance; for he came in by a rightful title, though he held over wrongfully. Then, here there being no payment of interest, the mortgagor held by wrong, and consequently the plaintiff ought to have brought his action within 20 years. But, secondly, the plaintiff is barred by the fine, and he ought to have made an entry in order to avoid it. [BAYLEY, J. The fine can have no operation; the mortgagor had no freehold; for in order to constitute a title by disseisin, there must be a wrongful entry; whereas in this case, there has been at most only a wrongful continuance of the possession. *Doe*

v. *Perkins*, 3 M. & S. 271, and *Smartle v. Williams*, 1 Salk. 245, are authorities expressly upon that point.]

Tindal, contra. The special verdict only states, that the principal was not paid on 8d November, 1780. It was the duty of the mortgagor to pay both principal and interest; and the Court will presume, until the fact be found otherwise, that the mortgagor did his duty. And then this is the case of a mortgagor in possession, paying interest to the mortgagee.

ABBOTT, C. J. Upon this finding, I am of opinion that this must be considered as an occupation by the permission of the mortgagee; and if so, there was no adverse possession, and the statute of limitations does not apply. The payment of interest would have been conclusive evidence of a continuing tenancy. That fact is not found by the jury; but that is not the only ground upon which the Court can proceed. If there were any circumstances from which the jury might have presumed that the premises were not occupied by the permission of the mortgagee, they ought to have found that fact. Here, however, is nothing to justify us in presuming that this occupation was not by the permission of the mortgagee. The judgment, therefore, must be for the plaintiff.

BAYLEY, J. I am of the same opinion. The argument proceeds on the ground, that the mortgagor was in possession by wrong; but as the special verdict does not find a wrongful possession, we ought not to presume it. The statute of limitations cannot attach, unless it be shown, that the mortgagor held in opposition to the will of the mortgagee. It is clear the fine cannot operate to displace or divest the right of the mortgagee, and does not therefore require an entry to avoid it.

HOLROYD and BEST, Js., concurred.

Judgment affirmed.

See *Coots on the Law of Mortgage*, p. 348.

The KING v. The Steward and Suitors of the Manor of HAVERING ATTE BOWER.—p. 691.

By charter the king granted that the steward and suitors of a manor should have power to hold a court for the determination of civil suits, and there had been a nonuser of the court for fifty years (except for the purpose of levying fines and suffering recoveries.) Held, that this Court, being for the public benefit, the words of permission in the charter were obligatory; and that the right of determining suits was not lost by the nonuser.

CHITTY had obtained a rule nisi for a mandamus to the stewards and suitors of the court of the lordship or manor of Havering Atte Bower, in the county of Essex, to receive and admit the plaint of Wm. Wood against George Butcher, and to issue process from the said court thereon, and to proceed to hear and determine the same, pursuant to the charter of 2 Jac. 1. The affidavits set out the charter by which the king granted that the steward and suitors, for the time being, of

the court belonging to the manor (which was of ancient demesne) should have power and authority to hear and determine, by plaints to be levied and prosecuted in the said court, pleas, debts, accounts, covenants, trespasses, as well by force and arms committed as otherwise, detention of chattels, and all other contracts whatsoever, within the lordship or manor aforesaid made, done, or arising, although the same debts, &c., do amount to or exceed 40s. The charter had been acted upon, and the court regularly held every three weeks. But by the records it appeared, that the last plaint for a debt or contract had been heard and determined in 1776: the last instance of a suit in replevin was in 1790, and in ejectment, in 1808; but fines and recoveries, relating to lands within the manor, had been constantly levied, suffered, and perfected up to the present time. The application on the part of Wood was made in January last; when he, having appeared before a court duly held before the steward and suitors, on that day demanded to levy a plaint against Butcher, both being tenants within the manor, for the recovery of a debt of 1l. 17s., arising within the manor.

Gaselee showed cause, and stated, that the steward and suitors had no objection to the rule being made absolute, in case this Court were of opinion that the non-user for fifty years had not deprived them of the power of holding any such court for the recovery of debts.

Chitty, contra, was stopped by the Court.

Per Curiam. This being a court established for the public benefit, the words of permission used in the charter are obligatory; and the right of determining suits like the present cannot be lost by the non-user stated in this affidavit. And they referred to *Rex v. Mayor and Jurats of Hastings*, determined in last Hilary term.

Rule absolute.*

* *Rex v. The Mayor and Jurats of Hastings*. The charter of 20 Car. 2 granted that the mayor and jurats of every one of the cinque ports or ancient towns might have and hold, and have power to have and hold, in each cinque port or ancient town, a court of record for determining suits concerning all manner of debts, accounts, covenants, contracts, &c., arising within their respective limits. A rule nisi having been obtained for a mandamus to the defendants to hold a court of record for those purposes, the Court of King's Bench, although it appeared by the affidavits that no such court had been held in Hastings since 1790, made the rule absolute.

The KING v. The Inhabitants of ST. AUSTELL.—p. 698.

Where the owner of the soil, by indenture, granted to certain adventurers full and free liberty to dig, mine, and search for tin, tin ore, &c., and the same to take and convert to their own use, subject to a reservation therein contained, and to make such adits, shafts, &c., as they should think necessary: yielding and paying to him one full eighth share of all such tin, tin ore, &c.: the same having been first spalled, picked, or otherwise made merchantable, and fit to be smelted. And the indenture contained a power either for payment in ore, or the amount thereof in money, which had been acted upon; and the owner had received it in money: Held, that for this, his one-eighth share, he was liable to be rated as an occupier of land, the reservation operating as an exception out of the demise, and not being of the nature of a rent.

THOMAS CARLYON, Esq., appealed against the following assessment

for the relief of the poor of the parish of St. Austell, in the county of Cornwall.

Rates on tin and copper dues, and watercourses.

T. C., Esq., for Crinnis copper dues.

	£	s.	d.
Annual return,	4080	0	0
Amount taken at two-fifths,	1632	0	0
Assessments at 8s. in the pound,	244	16	0

The sessions amended the rate by striking out this assessment, and stated the following case. Mr. Carlyon, at the time of making the rate, was not an inhabitant of St. Austell, nor the occupier of any land, house, or other property therein, unless he was deemed to be such occupier in respect of the said dues: as to which the facts were, that he being seised in fee of all the lands within which a certain mine was situate, by indenture made 12th January, 1811, between him and one Joshua Rowe, in consideration of the payment therein reserved, and of the covenants, &c., therein contained, did give and grant unto the said Joshua Rowe, his partners, fellow-adventurers, &c., full and free liberty, license, power, and authority, to dig, work, mine, and search for tin, tin ore, copper, copper ore, and all other metals and minerals whatsoever, in and throughout all that part of his lands commonly called Crennis, situate, lying, and being in the parish of St. Austell, thereafter limited and described, and the same to take, carry away, convert, and dispose of to their own use, at their pleasure, subject to the reservation therein contained: and within the limits of the set thereby granted, to make such adits, shafts, &c., and to erect such sheds, &c., as they should from time to time think necessary: habendum for the term of 21 years: yielding and paying, laying out and delivering upon the grass, unto and for the use of the said Thomas Carlyon, his heirs or assigns, one full eighth part or share, or dish, of all tin, tin ore, copper, copper ore, lead, lead ore, and other metals and minerals which should or might, by virtue of the said indenture, be found and gotten, raised, and brought to grass within the limits of the set thereby granted, during the said term; the same having been first well and sufficiently spalled, picked, washed, stamped, or cressed, or otherwise, according to the several natures thereof, made merchantable and fit to be smelted and fairly divided, and laid out upon the grass at their costs and charges. The indenture contained further covenants, that they would, during the term, pay or deliver unto the said Thomas Carlyon, his heirs or assigns, or his toller or agent for the time being, the full and just one-eighth part, share, or dish therein reserved; or pay the same in money, at the election of the said Thomas Carlyon, his heirs or assigns, at such best price as the same could from time to time be sold for, within two months at farthest, after such tin, copper, or other metals and minerals should be returned and sold as aforesaid; and would give six days' notice in writing to him, or his agent or toller, of the time of every weighing or division of the tin, tin ore, &c., to be raised and gotten by virtue of these presents: and also, that they would pay all, and all manner of rates, taxes, and assessments what-

soever, which should at any time thereafter, during the term thereby granted, be taxed, charged, assessed, or imposed upon the tin, &c.; and the money which should arise from the sale thereof, or the dues thereby reserved, or upon Thomas Carlyon, his heirs or assigns, for or in respect thereof, and indemnify him from the same; and would effectually work the premises in the most proper and effectual manner, with a sufficient number of labouring miners, unless prevented by water or other inevitable impediment. By virtue of this grant or set, the mine had been worked ever since the date thereof, by Joshua Rowe, and certain persons or adventurers claiming under him, at their own sole risk and expense, by their own labourers, and under the entire direction and superintendence of their own agents, and without any expense, risk, or interference whatsoever, of or by, or on the part of Thomas Carlyon. Various shafts, levels, and other works necessary to search for and obtain ore had been dug and made, and counting-houses, and other houses built by the adventurers at a great expense, under and by virtue of the said grant or set within the limits thereof; and the mine, and all the erections thereon, and shafts, levels, and other workings within the same, had always, since the working of the said grant or set, been, and still are, in the sole occupation and possession of the adventurers. The mine is now a declining mine; but considerable quantities of copper ores had from time to time been raised from it: the whole of which, after undergoing several processes of breaking, washing, sifting, and stamping, at an expense varying according to the quality of the ores, from 1s. to 6s. and 7s. in the pound, and, as to the poorest ores, even to 15s. in the pound upon their market price, when cleansed for the purpose of separating them from earth and other substances, and thereby rendering them fit to be calcined and smelted, but by which process, the original and native quality of the ores themselves is not altered, had from time to time, before the same were calcined or smelted, been sold or disposed of by the adventurers, sometimes by public, and sometimes by private sale, as and when they thought fit, without any control or interference by, or on the part of the said Thomas Carlyon. No part of the ores raised had ever been rendered to Carlyon in kind; but in lieu thereof, one-eighth part of the money, from time to time arising from the sales of the ores, had been hitherto paid to him in pursuance of the said indenture. He had been, from time to time, rated and assessed towards the relief of the poor of the parish of St. Austell, in respect of such one-eighth part of the money so arising as aforesaid, and had paid the several assessments up to the making of the rate appealed against.

Wylde, in support of the order of sessions. In the *Lead Company v. Richardson*, 1 Burr. 1341, it was first determined that mines are not rateable generally, partly upon the ground, that coal-mines alone having been mentioned in the statute, the rule *expressio unius est exclusio alterius* applies, and partly because of the risk attending the working of them. In *Rowls v. Gells*, Cowper, 451, the person rated was the lessee of the lot and cope; and he was rated on the ground,

that he was the occupier of property to which the risk attending mining concerns did not apply. There, too, the persons working were acting under a general custom within the district, and not under a specific contract, as here. *Rex v. The Baptist Mill Company*, 1 M. & S. 612, was also similar, in both these respects, to *Rowls v. Gells*. Here, however, the owner is for the first time sought to be rated; unless, indeed, that question can be said to have arisen in *Rex v. St. Agnes*, 3 T. R. 480: where, however, the point was not argued. But the cases of *Rex v. The Bishop of Rochester*, 12 East, 353, and *Rex v. The Earl of Pomfret*, 5 M. & S. 189, are in point. Those were both cases of owners letting out their property upon a written contract, and the judgment of the Court was against the rate. The owner of a mine under circumstances like the present, may run a considerable risk; for he may be obliged to incur great expense in opening the mine before he lets it to the adventurer, and after having received the rent in ore, may be at great expense in making the mineral merchantable. Here, by the instrument in question, the right of possession in the mine passed to the adventurer, and the landlord, if he entered upon it, would be guilty of trespass; unless, as in *Doe dem. Hanley v. Wood*, 2 B. & A. 724, he came upon the land for the purpose of re-entry, pursuant to a power reserved. This is in fact a reservation of rent, and a rent is not rateable. There is an alternative in receiving the rent either in ore or in money, and the lord has elected to take it in money. In *Rex v. Earl of Pomfret*, it was held, that the defendant was not rateable under similar circumstances. It may be said that the Court there went upon the ground, that the lead reserved had gone through the process of smelting. Here, however, the ore is to be made merchantable; and it cannot surely depend on the quantum of manufacture to which it is subjected, whether it be rateable or not. This, therefore, although a reservation of part of the thing demised, does not operate as an exception, but as a render; and consequently the order of sessions was right.

ABBOTT, C. J. I am of opinion that, in this case, Mr. Carlyon is liable to be rated for the dues in question. I am unable to distinguish this case from *Rowls v. Gells* and *Rex v. The Baptist Mill Company*; and I think, therefore, that we ought to decide conformably to those authorities. Notwithstanding all that has been urged upon this subject, I cannot distinguish between the cases where a party takes an interest under a specific contract, as in this case, and where the adventurers work under a custom previously existing throughout a district. The case is distinguishable from the case of *The King v. The Earl of Pomfret* in two respects; first, because there was an absolute demise in that case of all the mines, under which the possession, both of that part which was worked and that which was not worked, passed to the lessees: but here there is an express reservation of part. In the second place, the share reserved to the lord, in *The King v. Earl of Pomfret*, was of smelted lead; but here the reservation is of part of the native mineral. On these grounds, it seems to me that we ought to decide in favour of the rate; and I do that with the less reluctance,

because it is still open to the party to institute an action against the person who may levy for the rate, and so to bring the question before a higher tribunal.

BAYLEY, J. We ought to lay out of the question the circumstance of this being a failing mine. For it is a beneficial and useful property to the person on whom this rate has been made; and it was held in *Rex v. Parrott*, 5 T. R. 593, that a coal mine, whether profitable or not, is still rateable. This falls within the principles laid down in *Rowls v. Gells*, *Rex v. St. Agnes*, and *Rex v. The Baptist Mill Company*, and is distinguishable from *Rex v. The Bishop of Rochester*, and *Rex v. The Earl of Pomfret*. Here, the person rated is in fact an occupier of land, and derives a profit in respect of that occupation; and that, according to the doctrine laid down in the first set of cases to which I have referred, makes him rateable; and he has not dispossessed himself of the possession of the land, as was done in the two latter cases. In *Rowls v. Gells* it was first decided, that a party was rateable for lot and cope. It is said, indeed, that the party rated there was a lessee. That distinction makes no difference; for, if the lot and cope had not been rateable in the hands of the original proprietor, it would not have been so in the hands of his lessee. The true ground of that decision was, that the party was there considered as an occupier of the land. *Rex v. St. Agnes* proceeded on the same ground; and in *Rex v. The Baptist Mill Company*, (at the time of which decision this Court were peculiarly familiar with the words of the act of parliament,) it was determined, that the lessees under the lord of the manor of his lot and free share of calamine were liable to be rated as occupiers of land; and the decision went on the ground, that the lord of the manor would, but for the lease, have been rateable for it also: for the Court considered him as occupying the land by the hands of the adventurers. The latter were to work the mine, and he was to receive part of the ore gotten, and the Court considered him as joint occupier with them. In *Rex v. The Bishop of Rochester*, the mine was let; and, whether it was worked or not, still the bishop was completely out of possession of it, and the adventurers worked for their own exclusive profit. There, the rent reserved was a money-rent, and the relation between the parties to the contract was that of landlord and tenant; and all that the Bishop of Rochester had was the reversion of the land. That, also, was the main ground of the decision in *Rex v. The Earl of Pomfret*. But, in this case, the adventurers have not the sole and exclusive occupation of the mine; they have only the sole and exclusive privilege of working it. This is not a conveyance of any interest in the mine till it is actually worked. It is only a privilege to dig for ore, and then only on the terms of leaving a certain portion of that ore in a fit state for the landlord. It seems to me, therefore, that, according to the authorities to which I have referred, Mr. Carlyon must in this case, be considered as the occupier of land; and, therefore, that he is liable to the present rate.

HOLROYD, J. In the view I have taken of this case, I entirely agree with the rest of the Court. The case of *Rowls v. Gells*, although it was doubted by Lord KENYON in *Rex v. Parrot*, seems to me to have

been well decided. It was confirmed by *Rex v. The Baptist Mill Company*, from which I cannot distinguish this case. The case of *Rex v. The Earl of Pomfret* is distinguishable on the grounds already stated.

BEST, J. If it were true that we must either overrule *Rex v. The Baptist Mill Company*, and the cases confirming that decision, or the case of *Rex v. The Earl of Pomfret*, I should be inclined to support the former. But it is not necessary, inasmuch as there is a material distinction between them. Here, it seems to me to be clear, that Mr. Carlyon is an occupier of land. For the mine is not in the exclusive occupation of the adventurers; and whatever, by the indenture, is not granted out of Mr. Carlyon, remains in him. All that the adventurers take under it is a license to enter and dig, and take away the minerals. But when they have so done, and the minerals are brought to grass, a division of the ore between them and the landlord takes place. This, then, is the same as if, instead of working for wages, they worked on condition of being paid by a certain share of the produce. In this case, therefore, the rate must be supported.

Order of Sessions quashed.

Gurney and *Adam* were to have argued on the other side.

DUNCAN v. STINT.—p. 702.

A motion for security of costs, on the ground of the plaintiff's residence abroad, cannot be made if the defendant has taken any step in the cause subsequently to his becoming acquainted with the fact of plaintiff's being resident abroad, and therefore the affidavit in support of the motion, if made after plea, must expressly state that defendant was not acquainted with it when he pleaded.

Campbell had obtained a rule nisi, in this case, for staying proceedings till security for costs was given. It appeared that the plaintiff went abroad in March, 1821, and that this action was commenced in November following, against the defendant, as acceptor of a bill of exchange. The defendant pleaded issuably on the 16th April last; and, on the 30th April, application for security for costs was made to the plaintiff's attorney, and refused. It was not sworn in the affidavits for the rule that the defendant did not, at the time of the action brought, or when the plea was put in, know of the plaintiff's being abroad.

Comyn showed cause, and contended that the affidavits were not sufficient; and he referred to *Du Belloix v. Lord Waterpark*, in Easter Term, 1821, where all the cases on this subject were reviewed by the Court, and the rule laid down, that a party is bound to apply for security for costs as early as possible; and that, if he does so after plea, he must state in his affidavit, that at the time he pleaded he was not aware of the plaintiff's absence from this country.

Campbell, contra. The general rule hitherto has been that a party may apply at any time before issue joined. In *Du Belloix v. Waterpark*, the plaintiff was abroad, and had been so for twenty years before

the action was brought: and that fact must have been known to the defendant. Here, it does not appear that the defendant knew anything about it.

Per Curiam. This rule was laid down, as stated in *Du Belloix v. Lord Waterpark*, that when a cause is pending, a party, if he means to apply for security for costs, must take no step after he knows that the plaintiff is out of England; for a defendant ought not to wait until expense has been necessarily incurred, which must frequently be the case, particularly in actions of trespass and replevin. Under the present circumstance, however, we will give leave to the defendant to file, if he can, a supplementary affidavit, stating that, at the time he pleaded, he was not acquainted with the plaintiff's absence from this country. If that affidavit is not filed, the rule must be discharged.

Rule accordingly.

GROTTICK v. BAILEY.—p. 703.

On motion for setting aside proceedings on the bail-bond, bail above having justified, the affidavit must state that the defendant has a good defence upon the merits.

Reader had obtained a rule for setting aside the proceedings on the bail-bond, in this cause, on payment of costs, bail above having been justified. The affidavit of the defendant, in support of the rule, only stated, that he had a good defence to the action.

Lawes, on showing cause, objected, that this affidavit was insufficient, and not having stated that the defendant had a good defence on the merits.

The Court were of this opinion; but the rule was afterwards made absolute upon terms.

Rule absolute.

LEWIS v. GADDERRER.—p. 704.

Where bail are rejected on account of the insufficiency of one, the bail-piece becomes a nullity, and therefore, the notice should be for putting in and justifying bail, and not of adding bail.

In this case the bail appeared on a former day, and were rejected, on account of the insufficiency of one. A fresh notice was then given, that John Hadaon would be added to the bail already put in for the defendant; and that he, together with J. W. Snell, one of the bail already put in, and who was one of the bail who had before offered to justify with the one who had been rejected, would justify on Wednesday the 8th of May.

Reader objected, that the notice was not sufficient: because the former bail having been rejected, the bail-piece was a nullity. A new bail

piece was therefore required; and the defendants were bound to give notice of putting and justifying bail, and not of adding bail.

F. Pollock, contra, contended, that this was not a nullity, because they were good for the purpose of render; and, therefore, there was something to add to.

HOLROYD, J., after having taken time to consider, said, that he had consulted the other Judges of the Court, and that they were of opinion the bail-piece was a nullity; and, consequently, that the notice was insufficient.

SPENCE and Another v. JONES, Esq.—p. 705.

The commissioners of bankrupt are authorized by the 49 G. 3, c. 121, s. 13, to bring up a bankrupt, charged in execution, for the purpose of a full disclosure of his estate and effects at any of the three meetings under the commission, or any adjournment thereof.

DEBT, brought by the plaintiffs in Easter term last, against the defendant, the marshal of the Marshalsea, for the escape of one White, committed to the custody of the defendant in execution. Plea, general issue. At the trial, before ABBOTT, C. J., at the Middlesex sittings after Michaelmas term, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:

In Trinity term, 1820, White was duly committed to the custody of the defendant in execution. On the 15th May, 1821, a commission of bankrupt was issued against White, under which he was declared a bankrupt, and the usual advertisement was inserted in the London Gazette, requiring him to surrender himself to the commissioners on the 2d and 9th days of June, and on the 7th of July then next, at twelve o'clock at noon on each of those days, at the Guildhall, London, and make a full discovery and disclosure of his estate and effects; and at the last sitting the bankrupt was required to finish his examination. On the 8th June the commissioners issued a warrant to the defendant, as such marshal, White then being in his custody, requiring him to bring the bankrupt before them on the following day, the 9th June, in order to be examined touching the discovery of his estate and effects, according to the direction of the several acts of parliament in that case made and provided. In compliance with this warrant the defendant, on the 9th day of June, brought White before the commissioners at Guildhall, and whilst he was there, and before his return into the rules of the King's Bench prison, this action was commenced, by filing the bill against the defendant. White did not pass his last examination on that day; but, after attending the commissioners, he was carried back to the King's Bench prison by the defendant, and has continued in such custody from that time hitherto, except that he was carried before the commissioners under similar warrants, on the 7th of July, and at various other times between that and the 1st of September, when he passed his last examination.

Parke, for the plaintiff. The commissioners had no authority to

bring the bankrupt before them on the 9th of June, which was the day appointed for the second meeting; and, consequently, the fact of his being out of the rules on that day constitutes an escape, and the defendant is liable in this action. The question depends entirely on the statute 49 G. 3, c. 121, s. 13, which, after reciting that inconveniences had arisen from the necessity, which then existed, of the attendance of commissioners of bankrupts in prison, to take the examinations of bankrupts charged in execution, enacts, "That every bankrupt, being in custody at the time of his *last examination*, although charged in execution, shall be brought before the commissioners to be examined by them in the same manner as was then practised with respect to bankrupts in custody on mesne process." It is clear, that, by the very words of the statute, the power of the commissioners is confined to the case of bankrupts in custody at the time of the last examination; and the word "last" cannot be rejected. By statute 5 G. 2, c. 30, the commissioners were obliged to go to the prison and examine a bankrupt charged in execution. And the legislature evidently intended by the statute 49 G. 3, c. 121, that until the last examination the creditor should have the benefit of the bankrupt being kept in close custody.

Campbell, contra. The commissioners were authorized to bring up the bankrupt at the second meeting. The word "last" may be rejected, if necessary; and it appears clearly, from the entire clause, considered with reference to the 5 G. 2, c. 30, to have been the intention of the legislature that the bankrupt charged in execution should be brought before the commissioners at any time for the purpose of examination. By the 5 G. 2, c. 30, s. 1, the bankrupt is required to submit himself to be examined from time to time by the commissioners, and, upon such his examination, fully and truly to disclose all his effects and estates. The term "examination," therefore, means an examination from time to time. Then, by s. 2, the commissioners are, within the forty-two days, to appoint three several meetings for the purposes *aforesaid*, the last to be on the forty-second day. Then, by s. 6, in case a bankrupt is in execution, the commissioners are to attend him from time to time, and take his discovery as in other cases, and the assignees are required to appoint persons to attend the bankrupt from time to time, and to produce his books, in order to prepare his last discovery and examination. The words "last examination" occur here for the first time, and evidently mean the same thing as discovery. He was then stopped by the Court.

ABBOTT, C. J. The question in this case depends entirely on the construction of the 49 G. 3, c. 121, s. 13. That section recites, that great inconveniences had arisen from the necessity which then existed of the attendance of commissioners of bankrupt in prison to take the examination of bankrupts charged in execution: and then it enacts, "That every bankrupt, being in custody at the time of his last examination, although charged in execution, shall be brought before the commissioners, to be examined by them, in the same manner as is now practised with respect to bankrupts in custody on mesne process."

Now, this is a remedial law, and ought to be so construed as to extend to the whole mischief intended to be remedied. If we were to hold the words *last examination* to mean only the last day or time of examination, a great proportion of the mischief recited in the statute would not be remedied. For, it is obvious that the examination of the bankrupt must frequently continue for several days, and it may be impossible, in many instances, for the commissioners to know beforehand what may be the last day of examination. Supposing the bankrupt not to be in custody, it is clear the commissioners might bring him before them as often as they thought necessary for the purposes of examination, and there can be no reason why they should not do so where the bankrupt is in custody in execution. By the 5 G. 2, c. 30, s. 6, it is enacted, "That in case the bankrupt is in execution, the commissioners are to attend him in prison, and to take his discovery as in other cases, and the assignees are empowered to appoint persons to attend the bankrupt, being in custody as aforesaid, and to produce to him his books, in order to prepare his last *discovery and examination*, a copy of which the bankrupt is to deliver to the assignees ten days at least before such *last examination*." It is quite clear that in this statute the word *examination*, being coupled with the word *discovery*, means that discovery and examination which may become final by a full and satisfactory discovery and disclosure of his estate. The words *last examination* seem to have been copied from this statute into the 49 G. 3, c. 121, s. 13, and these provisions being in *pari materia*, ought to receive a similar construction. I am, therefore, of opinion, that the words *last examination* mean that examination made from time to time, which is ultimately to be the final discovery of the bankrupt's estate and effects. That being so, the commissioners in this case were authorized to have the bankrupt brought before them on the occasion in question; and, consequently, there was no escape, and the judgment must be for the defendant.

BAYLEY, J. By the provisions of the 5 G. 2, c. 30, the commissioners were bound to appoint three several meetings for the appearance of the bankrupt, the last of which was to be on the forty-second day after his surrender, and if the bankrupt was in execution, the commissioners were bound to attend him in prison three different times. If he was not in execution, the commissioners might send for him, and he was bound to attend them. Under these circumstances, the 49 G. 3, c. 121, s. 13, was passed, the object of which appears, by the recital, to have been to remedy the inconvenience which arose from the commissioners being obliged to attend the bankrupt in prison. Now this inconvenience will not be remedied, if the commissioners are authorized only to bring the bankrupt before them once, viz. on the last day appointed for his examination, and are bound to attend him in prison on the first and second day; and a remedial act should be construed so as to remedy the whole mischief, which, in this case, was their attendance in prison at all. Before this statute passed, bankrupts in custody on mesne process might have been brought up before the commissioners upon any of the days appointed for their appearance; and

the object of the statute was to give the commissioners the same power over bankrupts charged in execution. The words "last examination" in the bankrupt act are not technical, and mean that entire examination, taken at different times, and constituting altogether a full disclosure of the bankrupt's estate and effects.

HOLROYD, J. I have entertained some doubts upon this question, but I am now satisfied, that the words "last examination" do not mean only the last day or time on which the bankrupt is examined by the commissioners, but the final disclosure of his estate and effects. The object of the legislature is to be collected from the whole of the 6th section of the 49 G. 3, c. 121, taken together, and that was to give the commissioners the same power of bringing before them bankrupts charged in execution, as they had previously with respect to bankrupts charged on mesne process. The 5 G. 2, c. 30, s. 1, makes it penal upon the bankrupt if he omits to surrender within 42 days after notice, and submit to be examined from time to time by the commissioners, and upon such examination, that is, on his examination from time to time, he is bound fully to disclose and discover his estate, &c.; and by section 2, the commissioners are to appoint, within the 42 days, three several meetings for the purposes aforesaid, and the last to be on the 42d day, and the bankrupt is to attend the commissioners, and to be free from arrest during the 42 days, provided that he is not in custody at the time of his surrender. Now, if the commissioners receive a complete disclosure of his effects at the first or second meeting, the bankrupt will not be compellable to make any further disclosure, and consequently, the last examination may be completed at the first or second meeting. It follows, therefore, that his last examination may be taken on either of those days. Considering then the 49 G. 3, c. 121, s. 13, with reference to the provisions of the 5 G. 2, c. 30, s. 6, I think we are warranted in construing the words "last examination" to mean the complete disclosure and discovery of the estate and effects of the bankrupt made from time to time: and whatever separate attendances are necessary for the purpose of making a full disclosure, constitute together the last examination.

BEST, J. I think, also, that the words *last examination* do not mean the examination which may take place on the last day of meeting, but the full and final disclosure of the bankrupt's estate and effects upon any of the days appointed for that purpose, and that the commissioners may bring him before them at any time appointed for that purpose.

Judgment for the defendant.

AMORY v. BRODRICK.—p. 712

A. covenanted that he would, from time to time, at the request of B., avow and confirm all actions that B. should bring in respect of a bond, of which A. was the obligee, without releasing the same. Declaration stated, that B. commenced an action in the name of A. against the obligor of the bond, and that A. did not, although often requested so to do, avow and justify the said action, but, on the contrary thereof, executed a release to the obligor of all actions, bonds, &c., by reason whereof the plaintiff was hindered from recovering the principal and interest, his costs and other expenses: Upon special demurrer to this breach, it was held, first, that the averment of request was unnecessary, and that it therefore required no venue, inasmuch as it appeared that the defendant had, by executing the release, disabled himself from bringing any action upon the bond. Secondly, that it was no ground of demurrer to the whole breach, that the plaintiff was not entitled to recover the special damage.

COVENANT upon a deed made between the defendant Brodrick, one Rawlins, and the plaintiff, whereby after reciting that Joshua Rowe, by bond of the 5th December, 1814, became bound to the defendant, Brodrick, in 8000*l.*, conditioned for payment of 4000*l.*, and that the bond had become forfeited by non-payment; and that Rawlins had contracted with Brodrick, the defendant, for the purchase of the bond, and the principal and interest due thereon, for 1700*l.*; and that Rawlins was indebted to Amory, the plaintiff, in 1700*l.*, for money advanced and paid; and that Rawlins had agreed to assign the bond absolutely to Amory; it was witnessed, that in pursuance of the agreement, and for the consideration therein mentioned, he, Brodrick, at the request, and by the direction and appointment of Rawlins, assigned to Amory the bond and all moneys due, or to become due thereon. Covenant by Brodrick, that he would not accept, take, or receive any of the principal moneys, and interest thereby intended to be bargained and sold, or make void the indenture, or any power or authority thereby given, or in pursuance thereof to be given; and that he would from time to time, at the request of the plaintiff, avow, ratify, and confirm all such actions, &c., as the plaintiff should lawfully make, take, bring, &c., in respect of the said premises without being nonsuited, or otherwise releasing the same, except with the special consent of the plaintiff. The plaintiff averred, that after the making of the indenture, he, on 12th May, 1821, commenced an action in the name of Brodrick against Rowe, upon the bond, to recover the principal and interest; yet, that the defendant, not regarding his covenant, did not, nor would, (although he was afterwards, to wit, on the day and year last aforesaid, requested by the plaintiff so to do,) avow, justify, and maintain, ratify or confirm the said action so commenced; but, on the contrary thereof, after the making of the said indenture, to wit, on the 6th day of March, 1821, &c., at, &c., the defendant did execute to Rowe a general release of all actions, bills, bonds, &c. By reason whereof, the plaintiff was hindered from recovering the principal money and interest made payable by the bond, and in proceeding in the action so commenced by him, and had also been deprived of the means of recovering the costs incurred by the action, and had sustained costs in endeavouring by rule

of Court to set aside the release. Demurrer to this breach of the declaration, and the causes assigned were: first, that there was no venue to the allegation of request in the declaration; and, secondly, that, by that breach, the plaintiff sought to recover damages which he was not entitled by law to recover.

Gaselee, in support of the demurrer. By this deed, the defendant covenants, at the request of the plaintiff, to avow, justify, and maintain all actions brought by him. *Lowe v. Kirby*, Sir W. Jones, 56, *Pecke v. Mithwolde*, Ibid. 85, *Banks v. Thwaites*, 3 Leon, 73, and *Back v. Owen*, 5 T. R. 409, are authorities to show, that a special allegation of request is necessary; and if it be a substantial allegation, it ought to have had a venue. [BAYLEY, J., the substantial breach begins by the words, "but on the contrary thereof." In *Harris v. Mantle*, 3 T. R. 307, the breach assigned was, that the defendant had not used the premises in a good and husbandlike manner, but, on the contrary thereof, had committed waste. The defendant pleaded, that he had not committed any waste, but used the premises in a good and husbandlike manner; and it was held, that the plaintiff was not at liberty to show that the defendant had not managed the farm in a husbandlike manner.] The plea there was, that he had not committed waste, and upon that issue, he could only prove waste. [BAYLEY, J. The plea applied to both parts of the breach, and then the question was, what was the substantial part of the breach.] Secondly, the breach is bad, because the costs of the action and the application to set aside the release are alleged as grounds of special damage, and non constat that he would have obtained those costs in the action, and *Sutton v. Johnson*, 1 T. R. 493, 610, is an authority to show, that that would be good ground of error, or in arrest of judgment.

Chitty, *contra*, was stopped by the Court.

ABBOTT, C. J. I am of opinion, that the first cause of demurrer assigned is not sufficient. A party is only bound to allege the request, where the object of that request is to oblige another person to do something. Here, the defendant, by executing the release to R., has disabled himself from supporting any action whatever, and that is the substantial part of the breach, and a request is wholly unnecessary. As to the second cause of demurrer, it is sufficient to say, that it is no good ground of demurrer to the whole breach, that the consequential damages are not recoverable. The plaintiff is entitled to recover some damage, and that is sufficient to support the breach.

BAYLEY, J. The case of *Duffield v. Scott*, 3 T. R. 374, is an authority to show that the last ground of demurrer cannot be supported. That was an action of debt on bond conditioned for the performance of covenants: upon oyer of the bond and of the deed there appeared to be a covenant by the testator to indemnify the plaintiff against all debts which his wife should, during separation, contract, and against the payment of all money, and all his costs which the plaintiff should be put to by his wife's contracts, debts, &c. The breach assigned in the replication, was, that A. B. had brought an action against the plaintiff for a debt which his wife had contracted during separation, and had recovered judgment for the debt and costs, and that the plaintiff was

obliged to pay the same, and to incur expenses in the defence of the suit; yet that the defendant did not indemnify the plaintiff for the costs so paid by him, or for his expenses. Upon demurrer it was argued, that the replication could not be supported, because the plaintiff had assigned a breach for the non-payment of a gross sum, part of which the defendant was not bound to pay; because, in order to entitle plaintiff to recover the costs and expenses, he should have shown that he had given notice of it to the defendant; but it was held, that the demurrer could not be supported, for the defendant was, at all events, answerable for the debt, and it was no objection to the action that the plaintiffs sought to recover more than they were actually entitled to. So, too, in covenant, if some of the breaches are good, and the others not, it is no ground of demurrer to the whole declaration, but the plaintiff shall have judgment for the breaches well assigned, *Pinkney v. Inhabitants de Rotel*, 2 Saund. 379. As to the other point, it is clear that the allegation of the request was unnecessary in this case, inasmuch as the defendant had, by executing the release, wholly disabled himself from bringing an action on the bond.

HOLROYD, J. Where a party covenants not to do a thing, a breach is well assigned, by showing that he has done it. The effect of the breach assigned in this case, is, that the defendant has done a particular act, whereby he has wholly disabled himself from avowing, &c. The allegation of request, therefore, was wholly unnecessary. On the other question, the formal words of demurrer show, that the objection cannot be sustained. The words are, that the said breach, and the matters therein contained, are not sufficient in law. Now the objection is, not that the whole breach is insufficient, but that a part of it is bad. If, however, there be any breach of covenant assigned, in respect of which the plaintiff is entitled to recover, a further allegation, that he has thereby sustained special damage, which by law he is not entitled to recover, will not prevent him from maintaining his action. If this objection be a ground of demurrer in itself, it should at all events, have been confined to that part of the breach only.

BEST, J., concurred.

Judgment for the plaintiff

SMITH v. PRITCHARD.—p. 717.

Under the 53 G. 3, c. 141, s. 2, it is requisite that the memorial of an annuity should contain the names and places of abode of the witnesses to a warrant of attorney, given as a collateral security; and, therefore, where it was thus stated, A. B., clerk to J. S. of D. Street, in the county of M., gent.: Held, that this was not sufficient, it appearing that A. B. did not reside, but only attended at the office there at the time.

CARTER had obtained a rule nisi for setting aside a warrant of attorney, and the judgment entered up thereon, given to secure an annuity, on the ground that the description or place of abode of the witness to the warrant of attorney was not correctly stated in the memorial. It appeared from the affidavits that it was thus stated in the memorial: "Charles Rilot, clerk to William Ager, of Great Marlborough street, in the county of Middlesex, gentleman." Charles Rilot did not reside in Great Marlborough street; but was a clerk to Mr. Ager, who resided there; and it was sworn that he had been well known to the defendant for thirteen years. In support of the rule *Darwin v. Lincoln*, ante, 444, was cited.

Denman showed cause. In *Darwin v. Lincoln* the subscribing witness was merely described as clerk of Mr. Birkett, and Mr. Birkett's residence was not added. So that there is a distinction between the two cases; for, here, he is described as clerk to Mr. Ager, of Great Marlborough street, and the place where he may be found does appear in the memorial. The 55 G. 3, c. 141, s. 2, only requires that the names of the parties and witnesses should be stated in the memorial, and nothing is said of their places of abode. It is true, the schedule, under the head of names of witnesses, states, "E. F. of." But, by the act, that schedule is to be varied according as the circumstances of the particular case may reasonably require. And there may be cases in which a witness has no place of residence. As, for instance, if he be a soldier or sailor. The word "of" may mean, therefore, that in such an event he should be described as E. F. of such a regiment, or of such a ship. The meaning of it is only, that a description of the witness is to be given, in order that he may be ascertained and identified. Here he is so. The description in this memorial would be sufficient in the case of an affidavit made by him. It must, surely, be more satisfactory to describe him in this manner than to have stated some obscure lodging, where his temporary residence may have been when the deed was executed. As to the merits of the case, it is clear that the defendant could not have been put to any inconvenience by it; for it is sworn that he had been thirteen years acquainted with the witness.

Marryat and *Carter*, contra. In *Darwin v. Lincoln* the witness was described as clerk to Mr. Birkett, who, in the deed, was described as of Cloak-lane; so that there his residence did appear. Here, the attorney might, if applied to, refuse to give information as to the witness. They were then stopped by the Court.

ABBOTT, C. J. I still retain the opinion which I delivered in *Dar-*

win v. Lincoln, that taking the second clause of the 53 G. 3, c. 141, and the schedule together, they require, not merely that the name, but the place of abode of the witness should be stated in the memorial. For the second clause requires that the names of the witnesses shall be inserted in the form or to the effect following, and, in the form given by the schedule, after the name of the witness, the word "of" is inserted. Now, that must mean, as it seems to me, that his place of residence should be added. The case of a soldier or a sailor, who may have no place of residence at the time, has been mentioned. Possibly those cases may be provided for by the subsequent words of the clause, giving a power of making such alterations in the schedule as the nature and circumstances of the particular case may reasonably require; and if, therefore, the witness has really no place of residence, the memorial may be sufficient, if it contain a description of him like that suggested in argument. But that is not suggested in the present case. There may be very good reasons why the legislature should require the residence of the party to be stated: for, by applying there, information may be obtained from persons perfectly disinterested, which may not always be the case where application is made at the attorney's office, where the deeds have been executed.

Rule absolute.

The KING v. The Inhabitants of WHITEHAVEN.—p. 720.

Where the unemancipated daughter of an Irishman, not having acquired any settlement of his own in England, became pregnant, being unmarried, and as such was actually chargeable under 85 G. 3, c. 101, s. 6: Held, that this did not make her father and the rest of his family removable by a pass to Ireland under 59 G. 3, c. 12, s. 33; but that the daughter might be removed by an order to the place of her birth in England.

UPON an appeal by the inhabitants of the township of Workington, in the county of Cumberland, against an order of removal of Mary M'Cormick, from the township of Whitehaven, in the said county, to the township of Workington; the sessions quashed the order, subject to the opinion of this Court upon the following case. The pauper, Mary M'Cormick, an unmarried woman with child, and thereby chargeable, but who had not applied for or received parochial relief, was removed from Whitehaven to Workington, as the place of her birth settlement. The pauper, at the time of her removal, was above the age of twenty-one, had gained no settlement for herself, was unemancipated, and living with her father and mother, as part of their family. The father and mother were both Irish, and had gained no settlement in England. The father had not applied for or received any relief from the removing township, for himself or any part of his family. The father was not examined by the removing magistrates. The question for the opinion of the Court was, whether, under the provisions of the 59 Geo. 3, c. 12, and the above circumstances, the pauper was properly removed to the place of her birth settlement.

F. Pollock and *Armstrong*, in support of the order of sessions.

Here the removal was improper; for the whole family should have been removed by a pass to Ireland, under 59 Geo. 3, c. 12, s. 33. That act provides, that if an Irishman, not having gained a settlement in any part of England, shall become chargeable to any parish, by himself or his family, they shall be passed, under the provisions of that act, to Ireland. Now here the pauper did become chargeable by his family: for his daughter being an unmarried woman, and pregnant, was, according to the 35 Geo. 3, c. 101, s. 6, actually chargeable to the parish where she was residing.

Per Curiam. We are of opinion that the chargeability contemplated by the legislature in 59 Geo. 3, c. 12, s. 33, was the actual asking for parish relief, and not the constructive chargeability created by 35 Geo. 3, c. 101, s. 6. The order of sessions is wrong, and must be quashed.

Order of sessions quashed.

Scarlett and Courtenay were to have argued on the other side.

DOE on the several demises of DRIVER, FINES, and Another, v. BOWLING.—p. 722.

Where a testator, after devising his estates to his wife for life, bequeathed certain specific real property (which he described particularly) to each of his three daughters in fee, and then bequeathed the surplus remaining book-debts, ready money, moneys in the funds, upon bond, and otherwise whatsoever, share and share alike, to be divided amongst his three daughters, to be paid them severally at twenty-two, their equal shares, and the interest in the meantime; and in case either of them died before twenty-two, or single, or before marriage, that the deceased's portion should be equally divided between the two survivors, share and share alike, or their heirs; and in case two died without heirs, that the whole should devolve to the survivor and her heirs, "*in case no husband was living. If so, they enjoy the property during life only, and afterwards, her or their fortune goes to the heir or heirs of the survivor or survivors at law;*" and that in case all his three daughters die without heirs, and leave no husband living, or at the decease of the said husband or husbands, certain legacies should be paid "out of the beforementioned estates;" and that all the residue of the estates should be sold, and equally divided, share and share alike, amongst his (the testator's) brothers and sisters: *Held*, that this latter devise extended both to the real and personal estate, and that the husbands of each of the daughters, by necessary implication, took an estate for life in the real property bequeathed to their respective wives.

EJECTMENT for certain premises, at Croydon, in Surrey. The case was tried at the Spring assizes for that county, in 1821, and a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case: James Harris, now deceased, being seized in fee, of the premises, on the 25th December, 1796, duly made his will, whereby he directed his executors to sell his business and stock in trade for the best price that could be got for them, and to allow his wife, Sarah, during her life, the use of such part of his household furniture, &c., as she might choose; and after her decease, to divide such household furniture, &c., equally amongst his three daughters, Elizabeth, Ann, and Sarah. And he then devised to his wife, for life, all his freehold estates, houses, lands, and buildings whatsoever; and at her decease, he bequeathed certain specific real property to each of his three

daughters, in fee. Each devise described very particularly the lands, &c., given to each daughter. And he then bequeathed as follows: And also after my decease, and all my just debts are fully paid, and my business and stock in trade disposed of, the surplus remaining, and book-debts, with all my ready money and moneys in the public funds, and moneys upon bonds, and mortgage, and otherwise, whomsoever, wheresoever and whatsoever, I give equally, share and share alike, to be divided amongst my three daughters, Elizabeth, Ann, and Sarah, to be paid them severally when they arrive to the age of twenty-two years, their equal share, and not before: and desire my executors, &c., may place the said sum, be what it will, out to interest, either in the public funds or for other real security, and apply the interest to their support, in order for the said interest to find them food and clothes, and pay for their education, or what is judged needful by their trust, so that they may not be obliged to live upon any part of their mother's small income; and in case either of my three daughters, Elizabeth, Ann, or Sarah, shall die before they arrive to the age of twenty-two years, or die single, or before marriage, the said deceased's portion shall be equally divided between the two surviving sisters, share and share alike, or their heirs; also, in case two of my daughters die without heirs, then the whole devolves to the surviving one, and her heirs, in case no husband is living; if so, they enjoy the property during life only, and afterwards her or their fortune goes to the heir or heirs of their sister, as heirs at law. I also make this reserve, in case all my three daughters shall die without heirs, and leave no husband living, or at the decease of the said husband or husbands, should it happen such then exist at their decease, I give, out of the before-mentioned estates, &c., [he then specified certain pecuniary legacies.] And if this should so happen, when those legacies are so paid, I leave and give all residue of my estates that remains, to be sold, and equally divided, share and share alike, amongst my three brothers George, Edward, and Joseph Harris, and sister Sarah Barnett, or their heirs. On the 22d January, 1799, the testator died, leaving Sarah, his wife, and Elizabeth, Ann, and Sarah, his daughters and only children surviving. In the month of September, 1802, Elizabeth died, unmarried and under the age of twenty-two years. On the 20th June, 1807, Ann married the defendant, and, after attaining her age of twenty-two years, died in May, 1808, without issue. On the 29th of August, 1809, Sarah married A. P. Driver, one of the lessors of the plaintiff; and afterwards on the 26th day of April, 1819, died, leaving issue. In September, 1820, the testator's widow died. The present ejectment was brought to recover possession of a moiety of a house originally contained in the specific devise in fee to Elizabeth, which moiety was claimed by the defendant as devisee under the above-recited clause. The question for the consideration of the Court was, whether, under the above clause, the defendant was or was not, on the 1st day of January, 1821, entitled as such devisee. It was admitted, on a question put by ABBOTT, C. J., that, on the death of all the three daughters, without issue, the heir at law of the survivor would be one of their three uncles, mentioned in the residuary clause of the will.

Platt, for the lessors of the plaintiff, contended that the latter part of the will was confined to the testator's personal estate only, and therefore, that the defendant did not, as husband of Ann, take an estate for life in the moiety of the house, which, on the death of Elizabeth, descended on her and Mrs. Driver, as surviving coheirresses. The testator first disposes of all his real property in fee to his three daughters, and then altogether of his personal estate. The daughters are to take equal shares, and the interest of their shares is to be applied to their support. And then, in case one of them dies under 22, her portion is to be equally divided; and if two die without heirs, then the whole devolved on the survivor. All this applies to the personal property, for the words share and portion are synonymous, and the former clearly is confined to the personal estate. If so, the devise by implication to the husband for life cannot apply to the real estate, and then the defendant has no title.

Chitty, contra. The devise applies to the whole, both real and personal. The word portion obviously refers to the previous division made by the testator of specific portions of his real property to his three daughters. And the words following them, relied on by the other side, are strong to this effect. For the testator, after saying, that the whole devolves to the surviving daughter in case no husband be living, adds, "if so they enjoy the property during life only, and afterwards her or their fortune goes to the heir of the surviving sister as heirs at law." These words property and fortune, apply to the whole given by the will, and the devise over is to the heirs of the sister as heirs at law, which can only be in case of real property. Then the devise over to the uncles is also strong; for he gives legacies "out of the before-mentioned estates," which is strong to show real property was intended, and ultimately after these legacies are paid, devises all the residue of his estates to be sold and equally divided. Now what was to be sold? That expression applies to real property peculiarly. Then taking the whole will together, it is clear the testator meant to include in this part of it, real property. If so, the moiety of Elizabeth's real estate comes under the will to Ann, and the defendant being entitled under the will to a life estate in that property, is entitled to the judgment of the Court.

ABBOTT, C. J. There is considerable obscurity and confusion in this will; but, upon the whole, I am of opinion, that the residuary clause and the gift over apply both to the real and personal property of the testator, and are not confined to the latter. The primary intention of the testator seems to have been, that all his property should be divided equally amongst his three daughters, and that their respective issue, if they had any, should inherit their mother's share. He does not leave them the whole property as tenants in common, but assigns certain specific portions of it to each daughter, and then leaves the residue "equally, share and share alike to them, to be paid at 22, their equal share." Then comes the provision, that in case of the death of any one of them before she arrived at 22, or in case she died single, her portion should be divided equally between the two survivors, share

and share alike, or their heirs. Now, it seems to me manifest, that the word portion in this part of the will is not confined to the personal estate of the testator, but applies to his real property also. The will then proceeds to state, that in case two of his daughters die without heirs, the whole should devolve "to the survivor and her heirs, in case no husband is living, if so, they enjoy the property during life only, and afterwards her or their fortune go to the heirs of their sister as heirs at law." And in case all three die without issue "and leave no husband living, or at the decease of such husband, should it happen such then exist at their decease," he gives certain legacies out of "the before mentioned estates," and all the residue of the estates to be sold and equally divided among his three brothers, share and share alike. Now it seems to me, that the word estates is large enough to comprehend, and is most properly applicable to real property, and the direction that the estates shall be sold confirms that opinion. The provision in the will respecting the husband, is not an unusual provision. Although, therefore, there are no express words giving an estate for life to the husband, yet as it appears from the will, that the heir at law is not to take till after his death, it seems that the husband by necessary implication takes an estate for life. The defendant is therefore entitled to our judgment.

BAYLEY, J. If an estate be given to the heir at law expressly after the death of A., A. takes an estate for life by implication. Now that is clearly the case here, unless the latter part of the will be confined to the personal property alone: and taking the whole will together, it seems to me, that is not so confined, but that it extends to the real property also.

HOLROYD and BEST, Js., concurred.

Judgment for the defendant

The KING v. CLARK.—p. 728.
SAME v. SAME.

Defendant being taken up on the 8th June, upon an indictment for a libel, entered into a recognizance to appear and plead, within the first eight days of Trinity term, and to try the cause at the sittings after that term. The defendant pleaded not guilty, but did not give notices of trial or make up the record either for the sittings after Trinity or Michaelmas terms, nor were the recognizances respited. The prosecutors gave notice of trial after Trinity and Michaelmas terms but the causes were not tried. The defendant was ready and willing to take his trial on both these occasions. The recognizances were estreated in Hilary term, without any notice to the defendant or any motion by the prosecutor: *Held*, that this estreat was regular.

Bingham moved for a rule, calling upon the officer of the crown office, who had estreated the defendant's recognizances in these cases, to show cause why the estreat should not be set aside for irregularity, and why he should not pay the costs occasioned thereby. It appeared that the defendant was taken up under a Judge's warrant, issued against him upon an indictment found by the grand jury in this court

in Easter term last, for publishing a blasphemous libel, and that he on the 8th June last, entered into the usual recognizance, himself in 80*l*. and two sureties in 40*l*. each, to appear and plead within the first eight days of the then next Trinity term, and to try the cause, at the Middlesex sittings after that term, and personally to appear upon the return of the *postea*, if convicted, and, in the meantime to be of good behaviour. To this indictment he pleaded not guilty, on the 23d June. On the 29th June, another indictment having been found against him by the grand jury in this court for a subsequent publication of the same libel, he pleaded not guilty thereto; and, on the 30th June, entered into a second recognizance, himself in 80*l*. with one surety in 80*l*. for peremptorily proceeding to the trial of that indictment at the Middlesex sittings after Trinity term, and in the meantime, for being of good behaviour. The defendant did not give notices of trial, or make up the records in either of these prosecutions, either after Trinity or Michaelmas terms, nor did he obtain any rules for respiting the estreating of the recognizances. The prosecutors, however, gave notices of trial after Trinity term; but there being no sittings at Westminster, the causes were not tried. In Michaelmas term they gave notices again, and made up the records for trial. The causes after having been appointed for trial, were, in consequence of the pressure of business, made remanets to the sittings after Hilary term, upon the prosecutors' records. In Hilary term the recognizances were estreated, (without any notice to the defendant, or any motion for that purpose made by the prosecutors,) in consequence of the defendant's default, in not giving notices and making up the records, either in Trinity or Michaelmas terms last. It was contended, on the part of the defendant, that the estreat was irregular, inasmuch as the records having been actually taken down for trial by the prosecutors, no default had been made by the defendant, who was ready and willing to be tried there. And, besides, in this case, the defendant had no notice of his default.

Per Curiam. It was the defendant's duty in pursuance of his recognizances to be prepared, according to the practice of the Court, to try at the sittings after Trinity or Michaelmas terms, and he was not so prepared: for he neither gave notice to the prosecutors, nor made up the records on either occasion. And the prosecutors having done so is immaterial to the question. There was no necessity to give any notice to him that his recognizances would be estreated: for he was bound to take notice of the terms of his own recognizances. The rule must, therefore, be refused, the estreat being quite regular, and conformable to the ordinary practice of the Court.

Rule refused.

Ex parte GRIFFITH GRIFFITHS.—p. 780.

The Court will grant a *habeas corpus* to the warden of the fleet, to take the body of a debtor confined there, before a magistrate, to be examined from time to time, respecting a charge of felony or misdemeanor.

Chitty moved for a writ of *habeas corpus* to be directed to the warden of the fleet, commanding him to carry the body of Griffith Griffiths before the lord mayor, or some other justice of the city of London at the Mansion-house there, from day to day to be examined, touching a charge of felony and misdemeanor. It appeared by the affidavit of the sole owner of the ship Samuel of Liverpool, that Griffiths was the master of that ship, which was in February, 1821, chartered on a voyage from Liverpool to the Brazils, and back, and that Griffiths having had the certificate of registry duly delivered to him as master, had deviated and otherwise misconducted himself during the voyage; and on the 27th of April last, arrived with the ship in the port of London. Upon this he was personally required by the owner to deliver up either to him, or at the custom-house to the proper officer there, the certificate of registry. But he refused altogether so to do; whereupon the owner had applied to, and obtained a warrant against him from the lord mayor, for the purpose of proceeding to convict him of the offence pursuant to the statute of 34 G. 3, c. 68, s. 18, and thereby enabling himself to obtain a registry *de nova* of the ship if necessary. Griffiths being, however, at this time, a prisoner in the fleet for debt, there was no power of taking him under the warrant unless the Court granted this writ. And he referred to *Rex v. Woodham*, 2 Str. 828.

The Court thought it a proper case for their interference, and thereupon directed the writ to issue.

Writ granted.

The KING *v.* EDMUND GRIFFITHS, Esq.—p. 731.

Where a return to a *mandamus* to restore a party to a corporate office is defective in form, but, on the whole, it appears that there is good ground for a motion, the Court will not award a *peremptory mandamus*; the only effect of which would be to compel the corporation to restore an officer whom they would be bound immediately to remove in a more formal manner.

MANDAMUS directed to the mayor, aldermen, and common council of the city of Bristol, to restore the defendant to the office of steward of the Tolzey Court of that city. The corporation returned in substance as follows: That the mayor, burgesses and commonalty of the city of Bristol were a corporation by prescription. And that the Court of the Tolzey in the said city was an ancient court of record, holden in the Guildhall of the said city, before the sheriffs, according to the law of merchants, and according to the immemorial usage and custom of the said city, and according to the liberties granted by charter, having cognizance of pleas to an unlimited amount, and having also privilege of

proceeding by foreign attachment; and that the office of steward of the said court, was an office of great trust, touching the administration of justice therein; and that it was the duty of the steward to attend the court whenever the same was holden, and more particularly courts appointed for trials of causes at issue. It then set out a charter of Charles the Second, incorporating the common council, and giving a power of making by-laws, and providing, that in case of death, a motion, &c., the steward should be elected by the mayor and common council. On the 10th September, 1795, Mr. Griffiths was elected by the common council, and took the oath of office. In 1814, whilst the defendant was steward, it appearing to be expedient that courts should be holden more frequently than they had usually been, it was determined by the Court that they, in future, should be holden every week, except during the time of holding the *Pie Poudre* Court; and that courts for rules and courts for trials should be held on each alternate Monday, of which determination the defendant gave public notice. For upwards of three years after such determination, and during the time the defendant continued to reside at Bristol, the court was generally holden every week, except during the time of holding the *Pie Poudre* Court, and during all that time the defendant usually attended the courts, as well when they were held for rules as for trials. In April, 1818, he was appointed a police magistrate in London, and from thence continually ceased to reside in Bristol, or within 100 miles thereof, the office of police magistrate being one of great trust, and requiring almost constant attendance in London, and from that time he ceased to attend the courts regularly. There were held between April, 1818, and January, 1821, seventy courts for rules, of which the defendant had attended few, if any; and only thirteen courts for trials could be held during that time. On the 9th of June, 1819, on complaint being made to the mayor and common council, he was requested to attend every court. On the 15th September, 1819, the sheriff reported that 37 courts had been held from 15th December, 1818, to September, 1819; of which the steward had attended only five, and that many questions of difficulty had arisen, and improper responsibility had been thrown on the sheriffs. Upon this there was an order to him to attend every court. The return then stated that many courts had been held afterwards, and that defendant had in particular omitted attending two, viz., 8th and 15th November. On the 28th June, 1819, the sheriffs appointed a court for trials, of which notice was given to the defendant, stating that there were causes at issue, and ready for trial; but he did not attend, in breach of the duty of his office. The same happened on the 29th November, and 13th December, 1819, and 24th April, 5th June, 28th August, and 18th September, 1820, and thereby he delayed the suitors; and by this irregularity and unfrequency of holding the courts, suitors were prevented from bringing actions. On 18th December, 1820, the sheriffs appointed another court for trials, of which the defendant had notice. On this he wrote a letter, saying, he could not concur, and could not have any court until the 8th January, and omitted attending on the 18th December. On the 13th December, 1820, a meeting of the common council

was held, when the sheriff's report was read, which stated, that ten courts had been appointed, at only one of which the defendant had attended; and it was resolved that he should have notice to attend at the then next meeting of the common council, to be held at the court-house on the 6th January, to show cause why he should not be amoved by the mayor and common council from his office of steward of the court, for his repeated absences from the courts, and the injury and inconvenience sustained by the public in consequence thereof. Notice of this was given to him on the 16th December. On the 6th January, 1821, a meeting of the mayor and common council, at the court-house, was duly held, for the purpose of considering the premises, &c. At this meeting the defendant did not appear or show cause; whereupon an order was made to amove him, and his office was declared vacant. On the 13th January a successor was elected, who took upon himself the office.

Griffiths, in person, took several objections to the validity of this return, founded on the irregularity of the mode adopted by the corporation to amove him. But they have not been stated, the Court having expressly declined to pronounce any judgment upon them.

Ludlow, *contra*, after arguing upon these objections, contended, that, even supposing them to be valid, the Court would not grant a peremptory mandamus to restore, because it clearly appeared on the face of the return, that the defendant was liable to be removed. For the acceptance of the office of police-magistrate was inconsistent with his former office, and rendered it quite impossible for him to discharge properly the duties of the steward of this court. He referred to the 32 G. 3, c. 53, s. 2, 42 G. 3, c. 76, s. 3, and 1 & 2 G. 4, c. 118, s. 3, (the police acts,) and to the cases *Rex v. Mayor of Newcastle*, Bull. N. P. 206; 1 Burr. 530, S. C.; *Rex v. Mayor of London*, 2 T. R. 177; *Rex v. Mayor of Axbridge*, 2 Cowp. 523; *Rex v. Tidderly*, 1 Sid. 14.

Griffiths, in reply to this point, suggested that, by the 32 G. 3, c. 53, s. 2, only two magistrates are bound to attend at once in the police office; and by s. 1, there are three appointed. It was, therefore, very possible to arrange business so as to make the two offices quite consistent. In addition to this, any county magistrate may attend and do the duties of the office. As to the objection of incompatibility, it only applies to offices having a connexion with each other: as, where they are in the same corporation, or where the duties of the one depend on those of the other. Here, the two are wholly unconnected.

ABBOTT, C. J. It is unnecessary to pronounce any judgment upon the formal objections taken to this return, because I am clearly of opinion, that the Court are not to grant a peremptory mandamus in a case where, if the party was restored, he might be immediately removed again. The case of *Rex v. The Mayor of Newcastle*, cited in 1 Burr. 530, is an authority in point. There it appeared by the return, that there was a power to remove Mr. Featherstonhaugh, and the Court refused to interfere; and there are other cases which support the same principle. Now, from the facts stated on the face of this return, and if they are untrue, the defendant may bring an action for a false return, it appears that the Tolzey Court of Bristol is an immemorial

court, and that it is the duty of the steward to attend it whenever it is held. It is then stated, that in 1818, the defendant was appointed to the office of a police magistrate at Shadwell, and that from that time he ceased to reside at Bristol, or within a hundred miles thereof; his office of police magistrate being one which requires continual attendance in London. Now, it seems to me to be impossible to say, that this did not afford abundant cause for filling up the office with some other person. Without, therefore, giving any opinion upon the formal objections taken to this return, I think we ought not to grant a peremptory mandamus; because by so doing, we shall only unnecessarily harass the parties in this case.

BAILEY, J. It is in the discretion of the Court, according to the cases cited, to grant a peremptory mandamus; and, although there may be objections to the mode of removal in this case, still, as it appears on the face of the return that there is good ground for the removal, the only effect would be, that if we were to make an order for restoring the defendant to his office, it would become the duty of the corporation to remove him again, in a more formal manner, for his preceding neglect of duty. Under these circumstances, therefore, I think we shall best exercise the discretion vested in us, by refusing to grant a peremptory mandamus.

HOLROYD, J. concurred.

BEST, J. We are not obliged to do so absurd a thing, as to order a person to be restored to an office, (however irregularly he has been removed from it,) who ought to be removed again the moment that he is restored. The writ of mandamus was not intended to enable a party, by taking advantage of the want of form, to defeat justice. In the cases to which we have been referred, the Court in the exercise of its discretion refused the writs, although the parties against whom they were prayed, had acted irregularly. It appears from the judgment in *Rex v. The Mayor of London*, 2 Term. Rep. 177, that that refusal was not hastily given, but after much consideration by the Court. The Judges who decided that case, were not referred, in the course of the argument, to *Rex v. Axbridge*, which is an authority in point, or I think they would not have doubted as they appear to have done. The question for us to decide is, whether we shall advance justice by granting or refusing the writ. Mr. Griffiths has long ceased to do the duties of the office in the Tolzey Court, and he has now incapacitated himself by accepting a situation which requires his constant attendance, above 100 miles from Bristol. It has been urged that by an arrangement with his brother magistrates, he may always be absent from London on Saturday, Sunday and Monday, and therefore, that he could attend in his place at Bristol on Monday. But the sickness of a magistrate might interrupt this arrangement, or the state of the town might require the attendance of more than the ordinary number of magistrates. Ought any man to take an office, the duties of which are to be performed at a great distance from London, on the expectation of the uninterrupted continuance of this arrangement amongst the police ma-

gistrates? By restoring Mr. Griffith, instead of advancing justice, which is the object to be maintained by a mandamus, we stop the course of justice at Bristol, until he shall be regularly removed, and another person again appointed in his place.

Peremptory mandamus refused.

WEST v. FRANCIS.—p. 737.

The vendor of a print, being a copy in part of another, by varying in some trifling respects from the main design, is liable to an action by the proprietor of the original; and that although the vendor did not know it to be a copy.

DECLARATION stated, that the plaintiff was the proprietor of seven prints therein described, and that he was entitled to the sole right and liberty of printing and re-printing the same; yet, that the defendant published, sold, and disposed of 500 copies of each of the said prints, without the consent of the plaintiff in writing. The second count stated, that the defendant wrongfully sold and disposed of 500 copies of the said prints, being respectively copies in part of such prints, by small variations from the main designs. The third count charged, that a person, whose name to the plaintiff is yet unknown, did copy 500 of the said prints, by varying from the main designs thereof, without the express consent of the plaintiff; and that the defendant sold and disposed of 500 copies of the said prints so unlawfully copied. Plea, not guilty. At the trial before ABBOTT, C. J., at the Middlesex sittings after last Trinity term, it appeared, that the plaintiff was the proprietor of the prints described in the declaration; and that the defendant, who was a print-seller, had sold copies of the same, all varying from the original in some respect, but preserving generally the design of the original. There was no evidence to show that the defendant knew the prints he sold, to be copied from the plaintiff's prints. It was objected for the defendant, that the action was not maintainable under the 17 G. 3, c. 57, for merely selling a varied copy of a print. The Lord Chief Justice reserved the point, and the plaintiff having obtained a verdict, a rule nisi was obtained in last Michaelmas term for entering a nonsuit. And now,

Scarlett, Marryat, and Reader showed cause. The question is, whether the prints sold to the defendant can be considered as copies of the plaintiff's prints, within the meaning of the 17 G. 3, c. 57. That statute enacts, "That if any engraver, etcher, printseller, or other person, shall engrave, etch, or work, or cause or procure to be engraved, etched, or worked in mezzotinto, &c., or in any other manner, copy in the whole or in part, *by varying, adding to, or diminishing from the main design, &c.*" Now, it is clear, that an action would lie against the party who copied in part, by varying, adding to, or diminishing from the main design. The statute then goes on, "or shall print or reprint, or import for sale, or cause or procure to be printed, reprinted,

or imported for sale, or shall publish, sell, or otherwise dispose of any copy of any print, which shall be engraved, &c., in any part of Great Britain, without the express consent of the proprietor thereof in writing, &c., &c.; then every such proprietor, &c., shall by a special action upon the case to be brought against the person so offending, recover such damages as a jury, &c., shall give, together with double costs of suit." The question is, whether that which would clearly be a copy within the former part of the section, is also a copy within the latter branch. The whole clause forms one entire sentence, and a copy with variations is evidently within the latter as well as the former. Indeed, such a copy comes within the popular sense of the word. Suppose a party copied a writing without inserting the capital letters, or that he copied a map and put the names of the places in italics, each of these, strictly speaking, would be a copy, though not a copy in all its parts. So there may be a copy of a print with small variations, although it be not an exact copy. In *Gahagan v. Cooper*, 3 Camp. 111, the declaration confined the case to the selling exact copies. Here, the declaration contains a count for selling copies in part by small variations from the main design, and therefore, that point does not arise: and the objection, if it be one, is on the record. The 8 G. 2, c. 13, s. 1, is a statute on the same subject, and enacts, "That every person who shall invent, design, engrave, &c., in mezzotinto or from his own work and invention, shall cause to be designed and engraved, &c., any print, shall have the sole right of printing and reprinting the same for the term of 14 years; and that, if any printseller, or any other person whatsoever, shall engrave, &c., as aforesaid, or in any other manner copy and sell, or cause to be engraved, etched, or copied, and sold in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof in writing, signed by him in the presence of one or more credible witnesses, or knowing the same to be so printed or reprinted, without the consent of the proprietor or proprietors, shall publish, sell or expose to sale, or otherwise, or in any other manner dispose of such print without the consent, then such offender shall forfeit the plate on which such print shall be copied, &c., to the proprietor of such original print, and shall forfeit five shillings for every print found in his custody, either printed or exposed to sale, contrary to the true intent of this act, &c." The copy there contemplated, was clearly one varying from the original and not an exact copy. In that act, it is true, it is necessary, in order to make the seller liable to the penalty, that he should know that print to be a copy, but that qualification is omitted in the 17 G. 3, c. 57, the legislature evidently intending to extend a further protection to the proprietors of such works, and for that purpose making the seller of every copy responsible to the author.

Gurney and Denman, contra. This is a penal act; for the defendant is thereby rendered liable to double costs. The action is not brought for a penalty under the 8 G. 2, c. 13, but is a special action on the case, given by the 17 G. 3, c. 57. In the former statute, the

persons engraving and selling the prints, or causing to be engraved, copied, or sold, in the whole or in part, are guilty of an offence. But the party merely selling is only guilty of an offence when he knows it to have been printed without the consent of the proprietor. Considering the two acts together, it is rather to be inferred that the legislature meant the seller only to be liable to an action where he knew the copy was printed without the consent of the proprietor. The statute meant to distinguish between a fraudulent alterer and a mere seller. Here, the prints sold by the defendant varied from the plaintiff's prints; and, therefore, cannot be considered to be copies. The case of *Gahagan v. Cooper*, 8 Camp. 111, is expressly in point. It was, in that case, held to be no offence under the 38 G. 3, c. 71, which was made to prevent the pirating of busts and other figures, made and published by statuariers, to sell a pirated cast of the bust, if the piracy has any addition to or diminution from the original, and the words of that act of parliament are very similar to the present.

ABBOTT, C. J. This act of parliament was intended to preserve to artists the property of their works. The question is, what is the meaning of the word "copy" of a print. Now, in common parlance, there may be a copy of a print where there exists small variations from the original; and the question is, whether the words are used in that popular sense in this act of parliament. This is to be collected from looking at the whole clause, by which it is provided, that if any one shall engrave, &c., or in any other manner copy, in the whole or in part, by varying, adding to, or diminishing from, the main design, or shall print or reprint, or import for sale, or publish, sell, or otherwise dispose of any copy of any print, he shall be liable to an action. Now, if the selling of a copy with colourable variations is not within the act of parliament, the printing or importing for sale such copies will not be prohibited. The whole must be taken as one sentence; and the sale of any copy of a print, although there may be some colourable alteration, is within the act of parliament. The case of *Gahagan v. Cooper* proceeded upon a different act of parliament. In this case, I am satisfied, the verdict is right; and, therefore, this rule must be discharged.

BAYLEY, J. I am of the same opinion. The provisions of the 8 G. 2, c. 13, are entitled to great weight in the construction of this latter act of parliament. That act imposes, first, a penalty upon any persons who shall engrave, copy and sell, or cause to be copied and sold, in the whole or in part, by varying, adding to, or diminishing from the main design; and, secondly, upon persons selling the same, knowing them to be so printed or reprinted. The act of the 17 G. 3, c. 57, was passed to remedy the same mischief, and the words, "knowing the same to be so reprinted," are omitted. It may, therefore, be fairly inferred, that the legislature meant to make a seller liable, who did not even know that they were copies. The former part of the 17 G. 3, c. 57, s. 1, applies to persons who actually make the copy, and who, therefore, must know that it is a copy. But the latter branch applies to all persons who shall import for sale, or sell any copy of a print. Every

person, therefore, who sells a copy which comes so near the original as this, is thereby made liable to an action. There can be no reason why a person should not be liable where he sells a copy with a mere collusive variation; and, I think, we should put a narrow construction on the statute, if he held such a collusive variation from the original not to be a copy. A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original. For these reasons, I think, the plaintiff is entitled to recover; and consequently, that the rule must be discharged.

HOLROYD, J. I am of the same opinion. We should be careful not to give too extensive a construction to this act of parliament, but at the same time, one sufficient to remedy the mischiefs intended to be guarded against. The question is, what is the meaning of the word "copy." Now, in the preceding part of the clause, the legislature have called that a copy, which is not strictly so in all its parts, being one varying from the main design; and I think that the word must have the same construction in the latter part. *Gahagan v. Cooper* was decided upon another act of parliament, and Lord Ellenborough's judgment proceeded upon the particular mode in which the counts of the declaration were framed.

BEST, J., concurred.

Rule discharged.

WOOLLEY, Executrix of WOOLLEY, deceased, v. CLARK and Another.—p. 744.

The property of a deceased person vests in his executor from the time of his death, in an administrator from the time of the grant of the letters of administration; and, therefore, where A. took out letters of administration under a will by which he was appointed executor, and after notice of a subsequent will, sold the goods of the testator: *Held*, that the rightful executor in an action of trover was entitled to recover the full value of the goods sold; and that A. was not entitled, in mitigation of damages, to show that he had administered the assets to that amount.

TROVER for stock in trade and household goods. In the first count the goods were laid to be the property of the testator; in the second, of the plaintiff, as executrix. Plea, not guilty. At the trial, before ABBOTT, C. J., at the Middlesex sittings after last Michaelmas term, the following facts appeared in evidence; the testator died on the 16th of June, 1819; at that time the defendant, Clark, had in his possession a will of the testator, bearing date the 29th of April in that year, by which he was appointed executor. This will was proved on the 23d June, 1819, and administration was granted to Clark, and he directed the sale of the several articles mentioned in the declaration, which were sold by the other defendant, an auctioneer, on the 30th July, 1819. The testator had made another will on the 12th June, 1819, by which he appointed the plaintiff his executrix; and it was proved that the defendants had notice of this second will, previously to the sale of

the goods. The second will was proved on the 21st May, 1821, (the probate of the first will, under which the defendants acted, having been revoked upon citation,) and administration was granted to the plaintiff. It was contended, on the part of the defendant, that the revocation of the probate of the first will did not avoid all the mesne acts, but that the defendants might show due administration of the assets to the amount of the value of the goods. The Lord Chief Justice would not allow the defendants to give evidence of administration of the assets, and the plaintiff obtained a verdict for the full value of the goods. A rule nisi having been obtained for a new trial,

Brougham and *Chitty* now showed cause. The property vests in the executor from the time of the death of the testator; and, consequently, the defendant in this case had no right, as against the rightful executor, to sell these goods. The case of *Allen v. Dundas*, 3 T. R. 125, is an authority only to show, that a payment made to an executor, acting under an existing probate, by a party ignorant of its being unfairly obtained, is valid; and *Parker v. Kett*, 1 Ld. Raym. 658, only shows, that the party will be bound by a legal act done by an executor de son tort; but here the act was illegal.

The Solicitor-General and *Wightman*, contra. In *Allen v. Dundas* it was held, that the payment of money to an executor, who had obtained probate of a forged will, was a good discharge to the debtor of the intestate; and in *Pacman's* case, 6 Co. 19, it was held, that though letters of administration be countermanded and revoked, a gift or sale made by the administrator acting under the probate was not thereby defeated; and *Semine v. Semine*, 2 Lev. 90, is an authority to the same effect.

ABBOTT, C. J. There is a manifest distinction between the case of an administrator and an executor. An administrator derives his title wholly from the ecclesiastical court. He has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. An executor, on the other hand, derives his title from the will itself, and the property vests in him from the moment of the testator's death. That being so, the property vested in the plaintiff, as executrix, from the time of the death of the testator; and, consequently, the defendants, who had notice of the second will, had no right to sell, and therefore are liable in this action.

BAYLEY and HOLROYD, Justices, concurred.

BEST, J. Where a party obtains a judgment irregularly, which is afterwards set aside for irregularity, he is not justified in acting under it; but the sheriff is justified. Here the first probate was irregularly obtained. The party who obtained that probate, therefore, was not justified in selling the goods; but a creditor, who paid him a debt while the letters of administration were unrepealed, would be protected.

Rule discharged.*

* See *Philips v. Birn*, 1 Str. 509.

The KING v. The Sheriff of MIDDLESEX, in the case of WOODWARD v. FELTHAM.—p. 746.

Attachment irregular, being obtained after summons to attend before a judge for payment of debt and costs, the plaintiff's attorney not having attended at the time.

ABRAHAM had obtained, in last term, a rule nisi, for setting aside an attachment against the sheriff, for not bringing in the body, on the ground of irregularity. On showing cause, the matter was referred to the Master, who, on this day, reported that the defendant ought to have justified his bail on Monday, 4th February. On Saturday, 2d February, the defendant served a summons for payment of debt and costs, returnable on the 4th. The plaintiff's attorney did not attend, and the summons was renewed for the 5th. The bail not having justified on the 4th, the plaintiff, on the 5th, obtained the attachment. The Master was of opinion, that the attachment was irregular, because the plaintiff's attorney, by absenting himself from the first summons, ought not to be allowed to get the advantage of an attachment, which he would not have got if he had attended; as the Judge would probably, in that case, have directed the debt and costs to be paid on the 4th; and if not paid, then the attachment might have issued.

The Court, after hearing *Abraham* in support of the rule, and *D. F. Jones* contra, made the Rule absolute.

HARVEY v. COOKE.—p. 747.

On an application to discharge a defendant out of custody on the ground that she was a married woman, it is necessary that that fact should be positively stated in the affidavit. And, therefore, where it was sworn that she was a married woman, as by certificate annexed will appear, it was held insufficient.

GURNEY had obtained a rule nisi to discharge the defendant out of custody in this case, on the ground that she was a married woman. The defendant's affidavit stated, that she was a married woman, "as by the certificate annexed will appear," and that her husband, James Stamp Sutton Cooke, was still alive. She also stated, that she had never represented herself as a single woman. The affidavit also contained circumstances, by which it appeared that the plaintiffs were acquainted with her coverture. The affidavits in answer, positively negatived these facts, and stated, that she had represented herself as a widow, which the plaintiffs believed to be true when the goods were obtained in April, 1821. The certificate annexed was of the marriage of James Cooke to Sophia Saunders.

Whately showed cause, and contended, that where goods had been obtained, as in this case, under a fraudulent misrepresentation of the defendant's situation, the Court would never interfere to relieve her on motion, but would leave her to plead her coverture. Here, too, the affidavit is insufficient; for she does not swear positively that she is a married woman, but only that she is so as by the annexed certificate will appear; which is also in a different name from that of her husband.

Gurney and Chitty, contra. It is not denied that she is a married woman; and, therefore, it is useless to keep her in custody, as she must ultimately be discharged.

Per Curiam. It is clear that the affidavit is not sufficient in a case like this. It is, at all events, necessary to swear positively that the party is a married woman. It is not necessary to decide what would be the case if that fact had been positively sworn to by the defendant.
Rule discharged.

CHAPPELL and Others v. ASHLEY.—p. 749.

The notices required by 32 G. 2, c. 28, s. 16, need not be personally served on the detaining creditors. Where the service was sworn to be on the attorney of a creditor residing abroad, it was held sufficient, although the affidavit did not state that he was the attorney last employed in the suit under which the insolvent was detained, the objection being taken by the insolvent, and not on the part of the creditor.

ANDREWS moved for a rule nisi, to discharge the rule obtained by the plaintiffs for bringing up the defendant, under the compulsory clause in the Lords' act, for irregularity, in consequence of the insufficiency of the affidavit on which it was drawn up. By 32 G. 2, c. 28, s. 16, notices are required to be served on all and every creditor or creditors at whose suit a prisoner is detained in custody, if such creditor or creditors can be found out or met with; and, if not, then to the several attorneys last employed in the respective actions in which such prisoner shall be detained in custody. And it further provides, that every such prisoner, who shall be brought up, &c., shall, on proof being there first made of such notices as aforesaid having been given, deliver in open court a full, just, and true account, &c. The affidavit, on which the rule was obtained, stated, that Mr. Bish, one of the detaining creditors, had been served with a notice, by delivering and leaving a copy of it with one of his clerks, at his house in Cornhill. As to another creditor, named Dickens, it was sworn that he was resident abroad, and that the notice was personally served on Mr. Pocock, one of the firm of Pocock and Co., his attorneys; but it was not sworn that Pocock and Co. were the attorneys last employed by Dickens in the suit under which the defendant was detained in custody. It was contended, in support of the motion, that the legislature, in requiring service on the creditor, if he can be found or met with, obviously must have meant personal service, and then the service on Bish was defective; and that the affidavit as to the service on Pocock was defective, in not following the words of the act. This act, if disobeyed, entails highly penal consequences on the defendant; and, therefore, the affidavit should be quite accurate.

Per Curiam. The service of these notices was quite sufficient; for, as to that, this provision of the act of parliament is, probably, directory only. It was not intended for the benefit of the insolvent, but of the creditors, who were to take an interest under the assignment of his property. And no objection is made on their parts.

Rule refused.

SHADWELL v. BERTHOUD.—p. 750.

Where a plea is so framed as that it may reasonably induce the plaintiff to consult counsel in order to know how to deal with it, the Court will, on affidavit that each plea is wholly false, permit the plaintiff to sign judgment, as for want of a plea.

Lawes had obtained a rule to show cause, why the plaintiff should not be at liberty to sign judgment as for want of a plea. The action was brought against the defendant as acceptor of a bill of exchange. Plea, that the plaintiff was indebted to the defendant in a larger sum, by virtue of a certain recognizance acknowledged in the Court of Exchequer, which recognizance was still in full force and unsatisfied, "as by the said recognizance, remaining in the said court, more fully appears;" and concluded that the defendant was ready to verify this by the record: wherefore, &c. The affidavit stated, that this plea was wholly false.

Espinasse showed cause, and contended, that there was no ground for this application; and that the proper course, was, either for the defendant to have replied or demurred to the plea.

Per Curiam. This rule must be made absolute, for the plea was obviously for the purpose of gaining time, and would naturally induce the attorney for the plaintiff to consult counsel upon it; and, in such cases, if the plea be false, the Court will permit judgment to be signed. If these pleas are to be tolerated, the defendants ought, at least, to be compelled to adopt old and well-known forms.

Rule absolute.*

* This rule was again laid down by the Court in *Bodly v. Johnson*, in this term. There the plea was the general issue as to all the plaintiff's demand, except a certain sum; and as to one-third of that sum a bond given in satisfaction; as to another third, a set off; and as to the residue, a promissory note for the amount, given to the plaintiff, and still due. There, also, there was an affidavit that the plea was altogether false, and the Court permitted the plaintiff to sign judgment. In *Corbet v. Powell*, in the same term, the facts were these. Debt on bond by an executor. Plea, assignment of the bond before the death of the testator, and payment to the assignee. Replication, taking issue on the payment to the assignee. According to the ordinary practice, the similiter was added in the office: and after notice of trial given; the defendant, according to the ordinary practice, struck out the similiter, and demurred specially to the replication. There was an affidavit that the plea was false; and the Court, after hearing *Gaselee*, who showed cause, and *Merewether*, in support of the rule, made the rule absolute for signing judgment, as for want of a plea.

 RUSSEN v. HAYWARD.—p. 752.

It is not a valid objection on showing cause, that a rule to compute was moved on the day of signing interlocutory judgment for not bringing in the record

Chitty had obtained a rule nisi for referring it to the Master to compute, &c. It appeared, that the interlocutory judgment was signed for not producing the record on the 11th May last, and that the rule nisi was obtained on the same day.

Reader showed cause, and contended, that as the party had the whole day to produce the record, this motion could not be made till the following day.

BAYLEY, J. The moment the Court have pronounced interlocutory judgment, they may award a writ of inquiry, to refer it to the Master. We are only to consider how this will appear on the record, and there will be no error there; this rule, therefore, may be made absolute.

Rule absolute.*

*Abbott, C. J., and Best, J., had left the Court.

HAYWOOD, Gent., one, &c., v. CHAMBERS.—p. 753.

A bankrupt in the interval between the second and third meetings under his commission, gave a promissory note as a security for a pre-existing debt to a creditor, who was acting as one of the commissioners at the time, and afterwards signed the bankrupt's certificate. The debt for which the security was given was not proved under the commission: *Held*, that such security was invalid, and that no action could be maintained upon it.

ACTION on a promissory note, dated 16th December, 1815, for 24l., payable on demand: with other counts for work and labour, &c. The defendant pleaded his bankruptcy to all the counts, except that upon the promissory note, and gave notice to the plaintiff to prove the consideration for the note; he also obtained a Judge's order for particulars, under which the plaintiff had delivered a particular, stating the consideration for the note to have been business done by the plaintiff, as attorney for the defendant, prior to July, 1815. At the trial, at the Guildhall sittings in this term, before ABBOTT, C. J., it appeared that, on the 8d November, 1815, a commission of bankruptcy was issued against the defendant, under which he had obtained his certificate, and that the plaintiff was a commissioner named in the commission, and that he acted as such, and signed the defendant's certificate. The note was given in the interval between the second and third meetings under the commission. The debt for which the note was given, was not proved under the commission. Upon this, *Gurney*, for the defendant, objected at the trial, that the promissory note was invalid, inasmuch as the defendant was protected from the debt, for the business done for him by the plaintiff, by his certificate; and it could not be permitted, that a creditor should avail himself of his power as commissioner, and while the commission was in progress, to extort from the bankrupt a security for his debt. The Lord Chief Justice thought that a person circumstanced as the defendant was, at the time that he gave this note to the plaintiff, could not be considered a free agent, and he directed a nonsuit. And now,

The *Solicitor General*, by leave, moved to enter a verdict for the plaintiff. There was nothing in this case to show any improper practice

by the plaintiff, in order to obtain this note, or that any favour or threat was held out as an inducement. It is clear, that a security, given by a bankrupt, after a commission has been sued out, to a creditor for a pre-existing debt, is valid. *Trueman v. Fenton*, Cowp. 544; and there is nothing to take this case out of the rule there laid down. Here it was an advantage to the other creditors; for the plaintiff not having proved his debt, the dividend to them was pro tanto increased by it.

Per Curiam. If a security be taken in order to induce a commissioner to sign a bankrupt's certificate, it would clearly be void; and it is against public policy, that anything leading to that result should be allowed. A commissioner has an important public duty to discharge, and this would naturally have a tendency to warp his conduct in the discharge of it; and the bankrupt cannot be properly considered as a free agent, in giving a security under such circumstances.

Rule refused.

The KING *v.* The Justices of LANCASHIRE.—p. 755.

The 18 G. 3, c. 19, s. 5, gives an appeal only in case the majority of the overseers concur in it.

J. WILLIAMS had obtained a rule nisi for a mandamus to the defendants, to enter continuances, and hear the appeal of Samuel Stansfield, one of the overseers of the township of Ashton-under-Lyne, in the county of Lancaster, against the allowance of the sum of 24*l.*, in the constable's accounts for that township. It appeared from the affidavits, that the constable, pursuant to the 18 G. 3, c. 19, s. 4, had laid his accounts before a vestry meeting, on the 26th October last, when the item in question, being the amount of the expenses of a prosecution for a misdemeanor against Mr. Samuel Waller, a dissenting minister, for preaching in the streets, was disallowed by the vestry. He then, pursuant to the act, laid the accounts, on the 1st November last, before two justices of the peace for the county, by whom the disputed item was allowed. Against this allowance Stansfield, one of the overseers of the township, appealed. At the sessions, the remaining overseers, being seven in number, appeared, and being sworn, stated, in open court, their dissent from the appeal; and on this ground the sessions dismissed it, being of opinion, that unless the majority, at least, of the overseers concurred in it, the fifth section of the act gave no appeal.

Coltman showed cause. The Sessions have decided right in refusing to hear the appeal. By the 5th section of the 18 G. 3, c. 19, it is provided, that in case the overseer or overseers of the poor of any township shall find the parish is aggrieved by anything done or omitted by the constable, or shall have any material objection to the account, or to the determination of the justice mentioned in the 4th section, they may appeal. It is not said that the overseer or overseers, or any of them, may appeal. A discretion is vested in them by the act of parliament, which the majority are to exercise. And, here, the majority have

decided against the appeal. *Rex v. Pascoe*, 2 M. & S. 345, is plainly distinguishable; for there was no discretion to be exercised by the overseers in that case. It was merely a ministerial act; and any one of them, therefore, was competent to put the law in force.

J. Williams, in support of the rule. The words of the act are, that the overseer or overseers may appeal, which makes this case stronger than *Rex v. Pascoe*, where the singular number was omitted. This case is clearly within the mischief to be remedied; and, unless this appeal be allowed, it will be competent for the major part of the overseers, against the will of all the other inhabitants, to levy a tax upon them. It must always be in opposition to the majority of the rated inhabitants; for if not, the accounts will not be disallowed by the vestry; and it is only after such disallowance that the act provides for their being laid before a justice, against whose determination this appeal is given. Under these circumstances, the Court will surely, in justice to the rated inhabitants, construe the appeal clause liberally. And this appeal is within the words of the act. Why should the word overseer, in the singular number, be, for the first time, introduced in the appeal clause, if it be not that one overseer may appeal? The act cannot be speaking of some supposed case, of only one overseer being in a township; for one overseer cannot exist, by law, so as to be capable of doing any act. If, by death, the overseers be reduced to one, he cannot do any act until some other is appointed. Then, unless the intention be, that one of many overseers shall have the power to appeal, this word, "overseer," is altogether without any meaning.

ABBOTT, C. J. It is much to be lamented, that, in the different sections of this act of parliament, we should find a variety in the expressions used. But, looking at the whole, it seems to me that the words "the overseer or overseers," used in the 5th section, are to be construed in the same manner as the words "the overseers," used in the 4th; and that, by both, the collective body of the parish officers must be meant. I think, therefore, that the legislature did not intend thereby to give an appeal to any one of that body. It is urged, that by this construction the parish may sustain great injury; and, undoubtedly, it may happen that there may be no appeal, and that too contrary to the wishes of the majority of the persons rated. But this act of parliament seems to me to have intended to leave the appeal entirely to the discretion of the parish officers. In case the appeal be unsuccessful, costs are given: and, therefore, if we were to allow one of the overseers to appeal, and the Sessions awarded costs against him, he might possibly charge them to the parish rate. In *Rex v. Pascoe* this consequence could not have followed. I am, therefore, of opinion, that there can be no appeal, unless the majority of the parish officers concur in it, and that the Sessions have done right in this case.

BAYLEY, J. I am of the same opinion. This mischief suggested in argument could not be altogether remedied, unless an appeal had been given to the persons rated, which clearly is not the case. The clause gives a power of appeal to the overseer or overseers, if they find that the parish is aggrieved. Now, that implies that they are to exercise a judgment, which must be done by the majority.

HOLROYD, J. I think that, in this case, the right of appeal is given to the body of the parish officers, and that the majority of them are alone competent to exercise it, on the principle that, in the exercise of a public or general power, the majority are to act for the whole. Here, the appeal is only given where a grievance is found by them to exist. Now, if the majority, upon consideration, determine that there is no such grievance, it seems to me that the one in the minority ought not to be allowed to appeal, on the suggestion that he alone finds that a grievance exists. I think, therefore, that this rule should be discharged.

BEST, J., concurred.

Rule discharged.

Ex parte DEACON.—p. 759.

A married woman who, with her husband, is in execution for a debt contracted by her before coverture, is not entitled to be discharged under the insolvent act; she not being capable of executing a warrant of attorney, and complying with the other terms required by the 1 G. 4, c. 119, s. 25.

HOLT moved for a mandamus to the commissioners of the Court of Insolvent Debtors, directing them to receive and hear the petition of one Mary Deacon, a prisoner confined in the King's Bench prison, and to proceed to an adjudication thereupon. The prisoner was a married woman, and had been arrested, together with her husband, for a debt due from her before coverture, and both were then in execution for that debt. An application had been made to the Court of Common Pleas, in which Court the action had been brought, to discharge the wife, but that Court had refused. In consequence of this refusal she applied to the Court of Insolvent Debtors; filed her petition and schedule in due time, executed the regular assignment, and offered to submit to such other conditions as the Court, by the act 1 Geo. 4, c. 119, is authorized to impose upon insolvents seeking relief. The commissioners, however, were of opinion, that being a married woman, she was not entitled to the relief of the act, inasmuch as she could not comply with the terms of the 25th section, by which it is enacted, "that when an order is made for the discharge of a prisoner, the Court may order that a judgment shall be entered up against such prisoner, in some one of the superior courts of Westminster, in the name of the assignee or assignees of such prisoner, &c., &c., &c.; and that such prisoner shall execute a warrant of attorney to authorize the entering up of such judgment, and such judgment shall have the force of a recognisance." The commissioners considered this to be a preliminary condition to the granting of a prisoner's discharge, and inasmuch as a married woman could not execute a warrant of attorney, they considered her not entitled to relief. Mrs. Deacon had no property in her own right, or in the hands of trustees, out of which she could satisfy the debt. The husband joined in the affidavit, but did not state that he was not possessed of property, or was unable to discharge the debt from his own funds.

Holt contended, that the words of the 4th section were general, and did not limit the relief to any description of persons whatever. They were, "that it shall be lawful for any person who shall be in actual custody, upon any process whatever, &c., &c., &c., to apply by petition in a summary way, to the Court, for *his* or *her* discharge." There is no exception which debars a married woman of this relief. By the 44th section a certain mode of proceeding is marked out for the relief of persons of unsound mind. This shows that the relief was intended to be universal; otherwise this particular exception would not have been introduced. Minors are daily discharged, although they cannot make any assignment of their property, or execute a warrant of attorney. The language of the 25th section is not imperative; the words are, that the Court may order judgment to be entered up, and a warrant of attorney to be executed. It is true, that a married woman cannot execute a warrant of attorney; but there is nothing in the act which makes the entering up of a judgment and a warrant of attorney a preliminary condition to a prisoner's discharge. The applicant may remain a prisoner for life, if the present construction of the commissioners is right.

Per Curiam. We cannot interfere; the acts of a minor are not necessarily void but voidable only, and a minor may execute a deed for his own benefit. This woman cannot comply with the conditions of the act, and the commissioners have it not, therefore, in their power to discharge her; she is now in prison with her husband, who ought to pay this debt himself, and has not sworn to his incapacity so to do. The court in which the action was originally brought, may order her discharge, if they think proper; but we have no power; and we do not think that the commissioners of the Insolvent Debtors' court have misconstrued the act of parliament, in deciding, that a married woman who has no property to assign, who cannot execute a warrant of attorney, and comply with the other conditions, is not entitled to her discharge.

Rule refused.

The KING v. The Justices of FLINTSHIRE.—p. 761.

An order of sessions for levying and paying to the treasurer of the county, a sum to enable him to reimburse certain persons for an antecedent debt, although such debt had been incurred for county purposes, is bad.

PARKE, in last Michaelmas term, obtained a rule nisi for a certiorari, to remove an order of sessions of the county of Flint, dated 12th July last, for levying and paying into the hands of the treasurer of that county 200*l.* 5*s.*, to enable him to pay that sum, in part payment of the claim of Messrs. Sankey. It appeared that, by a former order of Sessions, the treasurer had been empowered to borrow from Messrs. Sankey, who were bankers, the sum of 1000*l.*, for carrying on the public works within the county, to be repaid by instalments. This money had been advanced, from time to time, in 1817 and 1818, and

repaid in account, but further advances being made, the balance remaining due to the bank was 447*l.*, in part payment of which this order was made. The affidavits on the other side stated, that the whole money had been, in fact, laid out for county purposes.

The Court (after hearing *Scarlett*, *Littledale*, and *D. F. Jones* against, and *Parke* in support of the rule) made the rule absolute; observing, that this was a rate to reimburse persons for a debt previously contracted, which was clearly bad, inasmuch as the justices had no right, except by following the provisions of particular acts of parliament, which had not been done here, to anticipate the county rates, and so to make the expense ultimately fall on different persons from those who were by law liable at the time it was incurred.

Writ of certiorari granted

LAUGHER v. BREFITT and Another.—p. 762.

In trespass against custom-house officers for taking plaintiff's goods, which had been returned in a deteriorated state before action brought, a verdict was found for plaintiff, for the difference in price between the value of the goods at the time of the seizure, and the time when they were returned. The judge certified that there was probable cause for the seizure: Held, that the plaintiff was not precluded by the 28 G. 3, c. 37, s. 24, from taking out execution for the damages found by the jury.

TRESPASS against the defendants, who were custom-house officers, for breaking and entering the plaintiff's warehouse, and seizing and taking a quantity of verdigrise belonging to the plaintiff, on pretence of its being French verdigrise, that had not paid duty. Second count, for taking the verdigrise. Plea, not guilty. At the trial, before ABBOTT, C. J., at the London sittings after last Hilary term, it was admitted on the part of the defendants, that the verdigrise in question was of English manufacture, and, therefore, not liable to the payment of any duty. It appeared, however, that it was a very close imitation of French verdigrise; the paper, also, in which it was packed, and the string round the packages, being similar to the paper and string in which French verdigrise was usually packed. The defendants kept the verdigrise six weeks in their custody, and delivered it to the plaintiff before the action was brought, but in a damaged state, and it was sold by the plaintiff before the trial. The jury found a verdict for the plaintiff, on the second count, for 73*l.* 15*s.* 8*d.*, the plaintiff being precluded from recovering on the first, by the terms of his notice of action; and the Lord Chief Justice certified, under the 28 G. 3, c. 37, s. 24, that there was probable cause for the seizure. By that statute it is enacted, "That in case any action shall be commenced against any person on account of the seizing of any goods forfeited by virtue of the revenue acts, and a verdict shall be given against the defendants; if the Judge before whom such action shall be tried shall certify that there was a probable cause for such seizure, then the plaintiff, besides the thing so seized, or the value thereof, shall not be entitled

to above 2d. damages, nor to any costs of suit." The plaintiff having entered up his judgment for the damages obtained at the trial, the *Solicitor-General* obtained a rule for setting aside that judgment, and for entering up judgment for the plaintiff for 2d. damages only.

Marryat and Eykyn now showed cause. By the very words of the statute the plaintiff is expressly entitled to recover the thing seized, or the value thereof. The verdigrise itself could only have been recovered in an action of detinue. The damages in the present action are the difference between the value of the verdigrise at the time of seizure and the time when it was returned. The plaintiff was not obliged to take it back in a deteriorated state; but he might have brought an action for its entire value at the time of seizure. In *Baldwin v. Tankard*, 1 H. Bl. 28, it was decided, that a Judge's certificate, under this statute, that there was probable cause for seizure, did not deprive a plaintiff of his damages for injuries accompanying the seizure.

The Solicitor-General and *Gurney*, contra. The object of the statute was to protect the officers from paying any costs or damages where there was a probable cause for the seizure. At common law the plaintiff would have been entitled to recover damages for the seizure. By the statute he is deprived of that right. The owner of the goods is entitled to have them returned, or to recover the value, but that must mean the value of the goods when they are returned, and not at the time when they are seized. The object of the statute was to prevent frauds upon the revenue. At all events, the plaintiff made his election by accepting the thing itself; and it is too late now to ask for further damages.

ABBOTT, C. J. I am of opinion, that the plaintiff is entitled to have judgment and execution for the damages found by the jury. The seizure, in this case, turned out in the result to be unlawful. Now, if the act of parliament had never passed, the plaintiff would have been entitled to recover damages for the injury he had sustained by the seizure and detention of his goods: and the value of them at the time they were seized, together with any loss he might have sustained by the seizure and detention, would be the measure of his damages. If, therefore, in the course of the cause, the goods had been returned, the plaintiff would still have been entitled to proceed for further damages. The act of parliament, in this case, deprives the plaintiff of his right to recover damages in respect of the seizure and detention of the goods; but expressly reserves to him the right of recovering the thing seized, or the value thereof. I am of opinion, that the value thereof means the value at the time of seizure, and not the value at the time when the goods are returned; and there being nothing to show that the plaintiff accepted the verdigrise itself in full satisfaction, I think that he is entitled to have the difference between the value of the verdigrise at the time of seizure and the time when it was returned to him; and, that being so, this rule must be discharged with costs.

Rule discharged with costs.

MEULÉ and Another v. GODDARD.—p. 766.

Where a new trial is ordered, the costs to abide the event, such event means the ultimate event of the cause, and therefore, if the verdict on the second trial be set aside, and on a third trial, the ultimate event is the same as at the first trial, the party will be entitled to the costs of the first trial.

In this case the plaintiff having obtained a verdict on the first trial, a new trial was ordered, and the costs of the first trial were directed to abide the event of such trial. Upon the second trial there was a verdict for the defendant, which was also set aside. The rule for setting aside that verdict, was silent as to the costs. Upon the third trial, the plaintiff obtained a verdict. The Master, on taxing the costs, allowed the plaintiff the costs of the first trial.

Gaselee now moved, that the Master might review his taxation, and contended, that the plaintiff could only be entitled to such costs, in the event of his obtaining a verdict on the second trial, which he had not done.

But the Court held, that the event of such trial meant the ultimate event of the cause.

Rule refused.

DOE dem. PHILLIPPS v. ROE.—p. 766.

A tenancy by virtue of an agreement in writing, for three months certain, is a tenancy "for a term," within the meaning of the 1 G. 4, c. 87. Upon a rule calling upon the tenant to enter into a recognisance under that statute, it is necessary to express in the rule nisi the amount of the security required.

A RULE had been obtained, calling on the tenant in possession, to show cause why he should not, pursuant to stat. 1 Geo. 4, c. 87, undertake, in case a verdict should pass for the plaintiff, to give judgment of the term next preceding the time of trial, and also why he should not enter into a recognisance, by himself and two sureties, in a reasonable sum conditioned to pay the costs and damages which might be recovered by the plaintiff in the action. The tenant had held the premises in question, which were of the annual value of 20*l.*, under the lessor of the plaintiff, for three months certain, by virtue of an instrument in writing, which was annexed to the affidavits in support of the rule, and was not stamped.

D. F. Jones showed cause. Here, as the agreement is not stamped it cannot be received in evidence, and then it does not appear at all that the defendant holds by an agreement in writing. The intention of the act was not to make any difference as to the admissibility of unstamped instruments, but to leave any objections as to the admissibility of evidence in the same situation, upon applications under this statute, as they would have been if the cause had been tried at Nisi Prius. If this had been an agreement only, it might have been doubted, whether, inasmuch as the subject-matter was altogether less than 20*l.*, the instrument required any stamp; but this instrument,

though called an agreement, enured in point of law as a lease, and therefore required a stamp, within 55 G. 3, c. 184, schedule part 1. Secondly, the case is not within the act of parliament, which applied only to cases of a demise for any *term or number of years*. Now here, the tenant held only for *three months*, and, indeed, had only engaged for that term. The words in the statute must be read, term of years or number of years, otherwise a taking for a week might be considered to be a term, and might expose the tenant to all the expensive proceedings authorized by this act. If a different construction is to prevail, the insertion in the first section of the act, after the words "for any term," of the words "or number of years certain, or from year to year," is mere surplusage. The true construction is, to apply the act of parliament to cases of considerable leases or holdings from year to year, so long as both parties please, and not to extend it to trifling cases of holding for minute fractions of a year. Thirdly, the rule nisi should have specified the amount of the security for which the plaintiff asked; if that sum were reasonable the tenant might not show any cause; if it were disproportionate or uncertain, he would be bound to do so.

Reader, in support of the rule, after stating that 55 G. 3, c. 184, schedule part 1, was confined to leases at a yearly rent, was stopped by the Court.

ABBOTT, C. J. It is unnecessary to decide the question as to the stamp, for, even if a stamp were requisite, we should enlarge the rule, and give the plaintiff time to get the instrument stamped. As to the second point, I think that the present was a "term" within the meaning of the act of parliament. One of the main objects of the statute was, to save the landlord the necessity of going to trial, where the tenant holds over vexatiously, and where the trouble and expense of an ejectment may be very disproportionate to the value of the premises. With respect to the third point, it appears to me to be sufficient, that the amount of the security should be specified when the rule is made absolute, as the Court will then be enabled to judge what may be a reasonable sum to be fixed, upon hearing all the circumstances of the case.

BAYLEY, J. I am also of opinion that the case is within the act of parliament. It is a very beneficial statute to landlords, where the tenant has really no defence, and it may be also beneficial to tenants, in saving them from fruitless expense.

HOLROYD and BEST, Js., concurred.

Rule discharged.*

* See Litt. a. 67, and Co. Litt. 54 b.

JONES v. WOOLLAM.—p. 769.

Debt on a bond given to plaintiff as treasurer of a friendly society. Plea, that the rules of the society had not been confirmed at the quarter sessions pursuant to 33 G. 3, c. 54: Held, upon demurrer, that the plea was bad, the bond being a good bond at common law.

DEBT on bond to the plaintiff, treasurer of a friendly society, &c. The condition set out on oyer was for the payment of a sum of money to the plaintiff, or his successor, treasurer of the friendly society above named, or the executors or administrators of the plaintiff. Plea, that the bond was executed by the defendant to the plaintiff, as treasurer of the society, and for the use and benefit of the society, and for no other cause or consideration whatever, and that the rules, orders, and regulations by which the society was governed, had not been exhibited, confirmed, or filed, at the quarter sessions, pursuant to the statute 33 G. 3, c. 54. To this plea there was a general demurrer.

Storks, in support of the demurrer, was stopped by the Court.

Barnewall, contra, contended, that the plaintiff in his character of treasurer to the society, had no authority to take the bond, inasmuch as the rules of the society had not been registered according to the provisions of the 33 G. 3, c. 54, s. 2.

Per Curiam. If the plaintiff does not comply with the terms of the statute, he may not be entitled to the privileges conferred thereby, but as there is no express provision avoiding securities given to treasurers neglecting to register the rules, the bond is good at common law, and the plaintiff is entitled to the judgment of the Court.

Judgment for the plaintiff.

DOE on the demise of the Earl of BRADFORD v. ROE.—p. 770.

Where a tenant holds from year to year, but without a lease or agreement in writing, it is not a case within 1 G. 4, c. 87, s. 1.

CAMPBELL moved for a rule, calling upon the tenant in possession, to show cause why he should not undertake, in case a verdict passed for the plaintiff, to give judgment of the term next preceding the trial, and why he should not enter into a recognisance, conditioned to pay the costs in pursuance of the 1 G. 4, c. 87, s. 1. It appeared upon the affidavit, that the tenant held from year to year, and that the tenancy had been determined by a regular notice to quit: but there was no lease or agreement in writing.

BAYLEY, J. The words of the statute are, "where the term or interest of any tenant holding under any lease or agreement in writing, any lands, &c., for any term or number of years certain, or from year to year, shall have expired or been determined by a notice to quit." I think the words, "under a lease or agreement in writing," apply to the whole sentence, and are not confined to the case of a tenant holding for a number of years certain.

Rule refused.

THE KING v. HIGHMORE.—p. 771.

Any information in the nature of a quo warranto may be granted at common law within the 9 Anne, c. 20, against a party for exercising the office of a bailiff in the borough of M., although it was not a corporate office.

Quere, whether in such a case the defendant may plead several matters.

QUO WARRANTO against the defendant for using and exercising the office of bailiff or sub-bailiff of the borough of Milbourne port, in the county of Somerset. To this information the defendant pleaded several special pleas. The bailiff was the returning officer of that borough. *Merewether* in last term obtained a rule to discharge the rule to plead several matters, and for striking out all the defendant's pleas except one, on the ground that this was not a corporate office, and therefore, was not within the 9 Anne, c. 20, and he cited *Rex v. Richardson*, 9 East, 469. And *Gaselee, contra*, had obtained a rule nisi for quashing the information, on the ground, that if this did not fall within 9 Anne, c. 20, the information itself could not be supported. Both rules were ordered to come on together.

Scarlett, Adam, and Merewether, for the crown, in support of their own rule, cited, addition to *Rex v. Richardson*, the cases of *Rex v. Wallis*, 5 T. R. 375; *Rex v. Williams*, 1 Burr. 402, and Buller, N. P. title *Mandamus*, 204, 211. And as to the other rule, they contended that this was a proceeding at common law, and not founded on 9 Anne, c. 20, and they cited numerous instances of such informations granted at common law previously to the passing of that act. They were then stopped by the Court.

Gaselee and Bayley, contra, contended that, if this was not a corporate office, there was no right to file any information, and if it was, then the defendant had a right to plead double. The 9 Anne, c. 20, s. 8, obviously refers to cases like the present. The words in the first section are not necessarily confined to corporate offices. For the preamble speaks of offices in cities, towns corporate, boroughs, and other places. [ABBOTT, C. J., there are the words "burgesses or freemen," which seems to confine it to places having burgesses or freemen.] In the 8th section, clearly the word borough has a more extensive signification, and it is strange, if the same word is used to signify two different things in the same act of parliament. The 32 G. 3, c. 58, corroborates this view. For, if that does not extend to other than corporate offices, there will be many cases where, after six years' possession, the party may be ousted by quo warranto. [BAYLEY, C. J. It is in the discretion of the Court to grant such rules, and probably they would not do it in such cases.] Here, the defendant has no other way of raising this point. The other side may, if there be no power to plead several matters, demur, and so the question will be on the record.

ABBOTT, C. J. It is too much to ask of the Court to quash an information founded, like the present, on numerous precedents, previous to the passing the statute 9 Anne c. 20; and that too, in a case in which it is open to the defendant, by writ of error, to raise the point. That rule must, therefore be discharged. On the same principle we

shall proceed with the other rule. If we make it absolute, we shall altogether prevent the defendant from setting our judgment right by writ of error; but if we discharge it, and the defendant pleads double, the error will be on the face of the record, and then the prosecutor may take the case ultimately before a higher tribunal.

Both rules discharged.

Note. The prosecutor did not demur, but filed replications to all the pleas.

The KING *v.* ROGERS.—p. 773.

The 17 G. 3, c. 56, s. 22, takes away the writ of certiorari only from offences for the first time created by the 22 G. 2, c. 27, and does not apply to those created by 12 G. 1, c. 34, and extended to the silk and cotton trades by 22 G. 2, c. 27.

SCARLETT had obtained a rule nisi for a certiorari to remove an order of Sessions, of the town and county of Nottingham, confirming a warrant of distress, signed by two magistrates, for enforcing the payment of wages, said to be due from Thomas Kay to William Rogers, for work done by the latter in the silk manufacture and the cotton manufactory. The wages, for which the warrant issued, had been paid previously in goods, which payment the magistrates altogether disallowed. The Sessions, on appeal, considered the point of law so doubtful, that they confirmed the order, subject to a special case. The question was, whether the certiorari was taken away.

Denman showed cause. There is no authority to issue a certiorari in this case. By the 12 G. 1, c. 34, s. 3, clothiers in the woollen manufacture were prohibited from paying wages to their workmen, partly in goods, and by the 4th section, a penalty was imposed on them for so doing. Now, the provisions, penalties, and forfeitures under that act contained, were, by the 22 G. 2, c. 27, s. 12, expressly extended to workmen in the silk and cotton manufacture, and the penalties and forfeitures were to be inflicted, levied, and recovered, in the same manner as those in the 12 G. 1, c. 34. Then came 17 G. 3, c. 56, s. 22, which took away the writ of certiorari in cases of proceedings for offences against the 22 G. 2, c. 27. The certiorari is, therefore, taken away here: for this is clearly an offence under the 22 G. 2, c. 27.

Scarlett and *N. R. Clarke*, contra. The certiorari is not taken away; for this is substantially an offence under the 12 G. 1, c. 34. The only effect of 22 G. 2, c. 27, was to extend the provisions of that act to the silk and cotton trade; but the offence was not by that act prohibited, but by the former. There are offences created by the 22 G. 2, c. 27, for the first time, to which the clause in the 17 G. 3, c. 56, most properly applies. Here, a special case, on a nice question of law, has been reserved by the Sessions; and, unless the writ of certiorari is expressly taken away, the Court will not refuse to grant it.

BAYLEY, J.* By the 22 G. 2, c. 27, a variety of specific offences were created; and that having been done, by the last clause the provisions of the act of 12 G. 1, c. 84, were extended to the silk and cotton trade. Now, I think that the best construction we can give to the 17 G. 3, c. 56, s. 22, on which this question turns, will be to hold, that it extends only to the offences created for the first time by the 22 G. 2, c. 27. If so, the writ of certiorari, in the present case, is not taken away.

HOLROYD, J., concurred.

Writ of certiorari granted.†

* Abbott, C. J., and Best, J., had left the Court.

† See 17 G. 3, s. 56, s. 20.

The KING v. The Inhabitants of OAKMERE.—p. 775.

Where a district previously extra-parochial, was by act of parliament made a township; and it was provided, that from thenceforth it should maintain its own poor and repair its own roads, and have the like powers, privileges, and immunities, and be subject to the same regulations as other townships within the county: Held, that this clause was prospective only, and that a bastard born within the district previously to passing the act was not settled there.

Two justices, by their order, dated April 1st, 1821, removed John Bradford from the township of Over Tabley to the township of Oakmere, both in the county of Chester. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case. The township of Oakmere was before, and until the passing of a certain act of parliament in the 52d year of his late majesty, part of the forest of Delamere, in the county of Chester, and an extra-parochial place. Under and by virtue of the said act, entitled, "An act for enclosing the forest of Delamere, in the county of Chester," the forest was, in December, 1819, duly divided into four separate townships, of which Oakmere was one. Since that time overseers of the poor have been duly appointed for the township of Oakmere. The pauper, John Bradford, was born many years ago, a bastard, in Oakmere, whilst it was an extra-parochial place, and part of the forest of Delamere. The question for the opinion of the Court was, whether such order of removal to Oakmere, as the birth-place of the pauper, could be sustained.

The following were the clauses in the local act, on which the question depended, "And be it further enacted, That the district called or known by the name of Delamere Forest, and all such lands lying contiguous thereto, as are now extra-parochial, shall, as soon as the moiety of the said forest, which is hereby directed to be allotted to and amongst the persons enjoying rights of common thereon shall have been so allotted, divided, and enclosed, be and be deemed and taken to be a parish, and called and known by the name of Delamere parish, and shall for ever thereafter be and be deemed and taken to be a rectory.

“And be it further enacted, That the said commissioners shall, and they are hereby authorized and required to divide the said parish into two or more townships, to be called and distinguished by such names as the said commissioners shall appoint; and when the same shall be so divided, each and every such township *shall, from thenceforth for ever thereafter, provide for its own poor, make and maintain its own roads, and have, enjoy, and be vested with such and the like powers, privileges, and immunities, and be subject to the same regulations as are incident to, and as are had, held, and enjoyed by the several other townships within the said county of Chester, by the laws and statutes of that part of the United Kingdom of Great Britain and Ireland called England.*”

Nolan, in support of the order of Sessions, contended, that the section of the local act was retrospective, and that all acts done within the local limits of Oakmere, which would have conferred a settlement elsewhere, were sufficient for that purpose to confer a settlement in Oakmere, after that place became a township. That is always the case where overseers are appointed for a vill, although no such overseers have ever been appointed before. Here, too, the clause makes them liable to the repair of roads, which must obviously extend to roads antecedently existing.

J. Williams, contra. In the case of a vill, it must have been so for time immemorial; and, therefore, it was, during all that time, a place where legally a settlement could be gained. But, here, it is made a township *de novo*. As to the roads, they were existing in Oakmere *at the time* it became a township, as well as before, and they, therefore, do not fall within the same reason as antecedent settlements, which had no such existence. The act must, as to the latter, be prospective; for, otherwise, injustice would follow. In this very instance, the mother of the pauper, at the time he was born, must have been removable to her own settlement elsewhere. But, being in an extra-parochial place, she could not then, for that reason only, be removed.

Cur. adv. vult.

And now, on this day, the judgment of the Court was delivered by ABBOTT, C. J. This case arises on the act 52 Geo. 3, for enclosing the forest of Delamere, and the question is, whether the district newly created into a township under this statute, which before was neither in any parish nor township, is to be considered as if it had formerly been a parish or township, with regard to settlements; or, only as becoming so from the time of its creation under the act, and as if it had formerly been wholly uninhabited. And we are of opinion, that the latter is the true construction and effect of the statute. If the former construction should be adopted, much inconvenience and litigation might ensue. Many parishes, wherein paupers have been considered as legally settled, and have accordingly been maintained, might relieve themselves from their burthen, by removing to this new township not only illegitimate persons born within the district whereof the township consists, but also many of those who had been servants or apprentices, or had rented tenements of the yearly value of 10*l.* within it. By such removals a

heavy burthen might be thrown at once upon the new township. It is true, on the other hand, that the new township, having now overseers, may remove persons, which the inhabitants of the district could not previously do: but then the inhabitants were not previously under the same legal obligation to maintain the poor who might be found within it, as a parish or township; the consequence of which must have been that such poor would, in general, find their way without removal into those parishes or townships that were compellable to maintain them; so that the new power of removal would not be likely to afford a relief commensurate with the new burthen: and the former want of the power of removal might have the effect of charging this new township with the maintenance of persons under circumstances in which, if the district had been previously a township, the inhabitants might have taken care to prevent the burthen from falling upon them, as by the removal of unmarried pregnant women, or of persons coming to settle on tenements under 10*l.* a year, especially before the stat. 35 Geo. 3, c. 101. The latter, indeed, would not acquire a settement for themselves, but settlements might be derived under them by apprentices and servants. And this is not like the case of a modern appointment of overseers to places that formerly had no such officers; because all such places must have been vills from time immemorial, and consequently under a legal obligation to maintain their poor, and possessing a legal right to the appointment of officers, and by such appointment to remove persons under the same circumstances as other townships or parishes might do. The consequence of this opinion is, that both the orders must be quashed.

Both orders quashed.

The KING v. The Inhabitants of BARLESTON.—p. 780.

Where a parish apprentice was assigned by his original master to J. S. by an instrument in writing, but there was no consent of two magistrates: Held, that this was not a lawful assignment under 32 G. 3, c. 57, s. 7, but it was sufficient to show the consent of the first master, to the service to J. S., and consequently, such service was good as a service under the original indenture, and conferred a settlement.

Two justices removed Samuel Blockley and his family from the parish of Heather, to the parish of Barleston, both in the county of Leicester. The sessions on appeal confirmed the order, subject to the opinion of this Court on the following case. In support of the order, a settlement by apprenticeship under a parish indenture to John Greasley in the appelland parish, was proved. The appellants, in order to show a subsequent settlement in the parish of St. Mary, in Leicester, gave in evidence a paper purporting to be an assignment of the pauper, in February, 1812, by the said John Greasley to Thomas Dalby of that parish, and proved a residence of more than 40 days in the same parish under that assignment. There was a premium of 5*l.* paid by Greasley to the new master, but it was the sum which he, Greasley, had received with the pauper, on the original binding from Hea-

ther. The instrument by which the assignment was made, was in writing, and was executed by Greasley, Dalby, and the pauper. The instrument, after reciting that the apprentice had about eight years of his term unexpired, as appeared by his indenture; stated, that for divers good considerations, Greasley did fully and absolutely give, grant, assign, and set over unto Thomas Dalby, of the borough of Leicester, framework-knitter, all such right, title, duty, term of years to come, service and demand whatsoever, which the said John Greasley had, in or to the said Samuel Blockley, or which he might or ought to have in him by virtue of the said indenture. And the said John Greasley covenanted with the said Thomas Dalby, that he, the said Samuel Blockley, should, notwithstanding anything to be done by Greasley during the said term of years, well and truly serve the said Thomas Dalby as his master, &c. Provided; that the said Thomas Dalby shall well entreat and use him, and learn him the craft, mystery, and occupation of a framework-knitter; and should also allow him sufficient meat, &c., which the said Thomas Dalby agreed to do in consideration of the services of the said apprentice; and also, the sum of 5*l.* agreed to be paid by Greasley to Dalby, being the said sum of money, which he, the said John Greasley, received with the said apprentice, from the churchwardens and overseers of Heather, on their putting and placing him, the said Samuel Blockley, apprentice to the said John Greasley. It was objected by the respondents, that this assignment was not made under the 32 G. 3, c. 57, with the consent of two magistrates in writing; and therefore, was not an instrument under which a settlement could be gained. The appellants contended, that it was a valid instrument to confer a settlement, and cited the 56 G. 3, c. 139, s. 9, which passed subsequently to the assignment. The case was argued on a former day by

Phillipps and *Dwarris*, in support of the order of sessions. This was not a valid assignment of the apprentice, not having been made with the sanction of two justices. The 32 G. 3, c. 57, s. 7, provides, that it shall be lawful to make assignments in writing, of parish apprentices by consent of two magistrates. And this is compulsory, it being for the benefit of the apprentice that a control of this sort should be exercised. It is argued, that 56 G. 3, c. 139, s. 9, shows that this is not the true construction, but that there might be valid assignments not in writing, and not with the consent of two justices. But this is easily explained; for the 9th section of 32 G. 3, c. 57, provides, that the 7th section shall not extend to cases where the premium given exceeds 5*l.* The 56 G. 3, c. 139, s. 9, extended the provision to all cases, whether the premium was more or less than 5*l.* The two clauses are therefore quite consistent. But, secondly, this is not good as a consent. For it was given *alio intuitu*, and that which is not valid as an assignment cannot be made good as a consent.

G. W. Marriott and *Simons*, *contra*. This was a good assignment. The 32 G. 3, c. 57, s. 7, only extends to cases of apprentices, whose masters being compellable by virtue of 8 and 9 W. 3, c. 30, s. 5, to take more than is convenient to them, may be forced to assign such

apprentices over to other persons. But this apprentice was not in that situation. There are many instances in which cases of parol assignment have come incidentally before the Court without objection; yet all these cases would have been wrongly determined if this be correct. The 56 G. 3, c. 139, s. 9, was passed for the very purpose of correcting this evil, and shows by its prohibition of such assignments in future, that theretofore they had been valid. But secondly, at all events this amounted to a consent by the first master, that the apprentice should serve the second. Here, he clearly knew and consented to the particular service. In what form that consent be given is immaterial, if in fact a consent be given. A settlement was therefore gained by the latter service, and the order of sessions is wrong.

Cur. adv. vult.

And now, on this day the judgment of the Court was delivered by ABBOTT, C. J. We are of opinion that the pauper gained a settlement in the borough of Leicester, and, consequently, that the rule must be made absolute for quashing the order of removal, and the order of sessions confirming the same. The assignment of the apprentice and the service to his new master, were prior to the prohibitory statute 56 Geo. 3, c. 139, and, therefore, are not affected by it. The prior statute 32 Geo. 3, c. 57, s. 7, is not a prohibitory but an enabling statute. Before that statute, a master could not discharge himself from the obligation to maintain a parish apprentice, by assigning him to another person, nor were the apprentice and the new master subject to the ordinary jurisdiction of the justices, with respect to masters and parish apprentices. This appears by the preamble to the section, and then the act proceeds with certain enactments, whereby if the terms are complied with, these inconveniences are remedied. If the terms are not complied with (and in the present instance they were not) the case is not within that statute; but it is to be considered, with regard to the law, as it stood before that act was passed. And so considered, although the assignment may be for many purposes inoperative, yet it manifests a consent of the first master to a service with the second, and renders that service a service under the original binding. This is established by the cases of *Rex v. The Inhabitants of East Bridgeford*, Burr. S. C. 133, 2 Bott. 407, S. C., and *Rex v. The Inhabitants of St. Petrox*, Ibid. 248. In the first of those cases, the widow of the first master, who was of Orston, without taking out administration to her husband, assigned the apprentice to one George, at Stanton, and George, afterwards, by parol, assigned him to one Baggeley, at East Bridgeford; and it was held, that he gained a settlement by the service at East Bridgeford, *by reason of the consent*. In the last of those cases the service, under the original binding, was in St. Petrox; and the first mistress endorsed the indenture, and delivered it up, together with her interest in the apprentice, to one Foale, of Stoke Fleming, and the apprentice, by a new indenture, to which the mistress was not a party, voluntarily bound herself to Foale, and served him at Stoke Fleming; and the Court held, that though an assignment of an apprentice (except by custom in London) cannot strictly be made; yet, as this assign-

ment was with the assent of the mistress, the service under it would be good, for the purpose of conferring a settlement; *for the servitude continued under the first binding.* And these cases, and some others determined upon the same principle, appear to have been recognised by the Court, in the case of *The King v. The Inhabitants of Christowe*, 11 East, 95, in which case the first master had not assigned the apprentice, but had taken upon himself to bind her out anew, with her consent, to another person, by a new indenture of apprenticeship; and the Court, on that account, thought that the service to the second master could not be considered as a service under the original indenture.

Order of sessions quashed.

DOE, on the demise of JOHN GILLARD, *v.* RICHARD GILLARD.
p. 785.

A. at the time of making his will, was seized in fee of certain freehold and leasehold premises, and, amongst the rest, of a dwelling-house, which he inhabited, in the parish of D. and six acres of land, situate in the parish of S., a mile distant from the village of B.; and seventy acres of leasehold land, in and near the village of B.; and fifty-eight acres of freehold land, and some leasehold land in the parish of W. A., at the time of making his will, resided in the dwelling-house, and had in his own occupation all the land in the parish of W., the freehold lands in the parish of S., and leasehold lands near the village of B.; but the freehold lands in the parish of D. were in the occupation of tenants. Before the making of the will, A. had contracted to sell all the lands in the parish of S., and the leaseholds near the village of B. The amount of A.'s debts at the time of his death exceeded his personal property. A., shortly before his death, made a will as follows: "I direct my debts, legacies, and funeral expenses to be paid; with the due payment whereof I charge my real estates. I give to my nephew, T. G., 700*l.*, to be paid by my executor; and to my nephew, J. G., (the heir at law) 20*l.*, to be paid by my executor; and, lastly, I constitute R. G. my sole executor of all my lands for ever, and all my leasehold property here or at B., or money that shall become due for the same, paying certain annuities thereout by half yearly payments: *Held*, that by this will the executors took a fee in the freehold lands in the parish of W.

EJECTMENT for freehold lands, situated in the parish of West Alvington, in the county of Devon. At the trial, before GRAHAM, B., at the Devon Summer assizes, 1821, a verdict was found for the defendant, subject to the opinion of the Court on the following case:

John Gillard, the lessor of the plaintiff, was the heir at law of Richard Gillard his uncle, deceased, who at the time of making his last will, and at the time of his death, was seized in fee-simple of several freehold and leasehold tenements; that is to say, of a certain freehold tenement, consisting of a dwelling-house and garden, with the appurtenances, called Greenhill; two other distinct freehold tenements, the one consisting of three cottages and gardens, with the appurtenances; and the other of four cottages and gardens, with the appurtenances; and a small leasehold garden near to the tenement, called Greenhill; all situate in the parish of Doddbrooke, in the county of Devon; six acres of land, situate in the parish of Stokenham, in the same county, and upwards of a mile distant from the village of Beeston, in the parish of

Stokenham; and of several leasehold tenements, and about 70 acres of leasehold land, in and near the village of Beeston; and of about 58 acres of freehold land, in five several distinct freehold tenements; and one leasehold tenement, consisting of 23 acres, situate in the parish of West Alvington, in the said county: but these estates were originally parts of a manor of Doddbrooke, and were, in 1812, purchased by and conveyed to the testator, Richard Gillard, as parts and parcels of such manor, on a general sale and division thereof, and which manor has, from that time, ceased to exist. Richard Gillard, the uncle, at the time of making and publishing his will, and at the time of his death, resided in the dwelling-house called Greenhill, and had in his own occupation all the land in the parish of West Alvington, and also the freehold lands in the parish of Stokenham, and leasehold tenement and leasehold land situate in and near the village of Beeston; but the freehold cottages and gardens, and the small leasehold garden in the parish of Doddbrooke, were in the occupation of tenants. The freehold land in West Alvington consisted of ten distinct closes or fields, eight of which lie together, except being separated by the highway; the other two were separated from these eight by estates belonging to other persons; and the nearest field to the residence of Richard Gillard, the uncle, was distant from it, by the common road, by somewhat less than half a mile. Before the making of the will, Richard Gillard, the uncle, had contracted to sell to one Newman all the lands situate in the parish of Stokenham, and the leaseholds in and near the village of Beeston, for the sum of 2,040*l*. The amount of the testator's debts, at the time of his death, exceeded his personal property. On the 6th day of September, 1819, Richard Gillard, the uncle, made his last will, duly executed so as to pass real estates, as follows: "First, I will and direct that all my just debts, legacies, and funeral expenses, shall be fully paid and discharged: and with the due payment whereof I do hereby subject and charge all my real estates, messuages, lands and tenements; first, I give and bequeath unto my nephew, Thomas Gillard of Highweek, 700*l*., to be paid by my executor; likewise, to my nephew John Gillard, the sum of 20*l*., to be paid by my executor; I give mortgage of Bartleek's house to Richard Gillard, my executor; lastly, I do make, constitute, and appoint Richard Gillard my whole and sole executor of all my lands for ever, and leasehold property, here or at Beeston, or money that shall become due for the same, paying Maria Bartlett, 12*l*. per annum, by half-yearly payments: and my sister Elizabeth 20*l*., by half-yearly payments. I give 50*l*. due from my brother's will to me, to my executor." John Gillard and Richard Gillard, mentioned in the will, were the plaintiff and defendant.

The case was argued on a former day in this term by *Carter* for the plaintiff, and *Adam* for the defendant. The cases of *Clements v. Cassey*, Noy's Rep. 48, and *Piggott v. Penrice*, Prec. Ch. 471, were cited for the plaintiff. The arguments on both sides were so fully reviewed in the judgment of the Court, that it is unnecessary to report them.

Cur. adv. vult.

And now on this day the judgment of the Court was delivered by

ABBOTT, C. J. Upon this will, considered as it ought to be, with reference to the state of the testator's property, we are perfectly satisfied that the testator intended that his executor should take all his freehold property; and we also think the words of the will sufficient to give effect to this manifest intention. It is found that the amount of the testator's debts exceeded the value of his personal property. The amount of a man's debts and the value of his personal property are subject to so much variation, from time to time, that, in general, very little reliance can be placed on such a fact. In the present case, however, the will was made so recently before the death of the testator, that it may be presumed to have been made with a view to that state of facts as likely to exist at the time of his death; and accordingly we find, that by his will he has charged all his real estates, messuages, lands, and tenements, with the payment of all his debts, legacies, and funeral expenses: and having so done, he immediately gives a legacy of 700*l.* to his nephew, Thomas Gillard, and a legacy of 20*l.* to his nephew, John Gillard, who is the lessor of the plaintiff, and the heir at law. If he had done no more the charge would scarcely have led to any conclusion against the heir, because he might well take the freehold, subject to the first, which is the most important charge; but he has done more, for he has directed these legacies to be paid by his executor, which shows that he meant his executor to take the estates, as the necessary fund to pay the legacies. In the conclusion also of his will, and immediately after the clause containing the gift to the executor, come the words "paying to M. Bartlett an annuity of 12*l.*, and to my sister Elizabeth an annuity of 20*l.*;" whereby the gift to the executor becomes chargeable with those annuities, and must, therefore, have been intended as a fund for the payment of them. This gift manifestly includes some part of the freehold estate; the question is, whether it includes the freehold at West Alvington, which was formerly parcel of the manor of Dodbrooke, and purchased by the testator as such, and which was in his own occupation, and at no great distance from his residence. The words of the gift are these: "I do make, constitute, and appoint Richard Gillard my whole and sole executor of all my lands for ever, and leasehold property, here or at Beeston, or money that shall become due for the same, paying, &c." The words "or money that shall become due for the same," manifestly relate to the contract whereby the testator had engaged to sell his freeholds at Stokenham, and leaseholds in and near Beeston, which is in the parish of Stokenham, for the single and undivided sum of 2,040*l.*; and it is clear, that whatever restriction, if any, be found in the words "here or at Beeston," as to the first member of the sentence, must be applicable to the latter member also; so that if there be any freehold not under contract for sale to which the gift will not extend, neither will the gift extend to the freehold which was under contract for sale; and in this view of the subject, the executor will not be able to convey to the purchaser the freeholds at Stokenham, nor be entitled to receive the value of those freeholds, but there must be two conveyances, and also a division of the price. The will, however, makes no provision for such a division, and the testator manifestly never thought of it, nor contem-

plated its occurrence. The intention of the testator being, as we think, thus manifested, it has been contended, that effect may be given to it, first, by considering the words "here or at Beeston" as relating only to the leasehold property; or, secondly, by considering those words as descriptive of all the testator's property, both freehold and leasehold. The latter construction will obviate every difficulty that may otherwise arise in the execution of this will, as it will exclude all beneficial interest, not of the heir only, but also the next of kin, and give the whole property of both kinds to the executor for his own benefit, subject only to the charges mentioned in the will, and prevent an intestacy, as to any interest legal or equitable, either direct or resulting from the operation of law. There appears to us, however, to be a greater difficulty in this second construction than in the first: it is easier to construe the word "here" as descriptive of the freehold at Alvington, under the peculiar circumstances of its occupation and situation, than to construe the words "at Beeston" as descriptive of the freehold in Stokenham; and as the leaseholds were of much less value than the freeholds, it is more probable that the testator should have omitted to make a proper description and gift of them, than that he should have done so, with regard to the freeholds, which he has so manifestly charged with one very considerable legacy, to be paid by his executor, and with another, or small amount indeed, to be paid also by the executor, and to be paid to the heir at law, who will take the estates, and, therefore, cannot want the money to be paid out of them, if they are not given to the executor. And for these reasons, and without prejudging any construction that may hereafter be put upon this will, by any court who may be required to decide upon the interests of the next of kin, we think ourselves warranted in adopting the construction first proposed, and which is sufficient for the present cause; and we are of opinion, that the words of description, "here or at Beeston," whatever be their meaning, are to be confined to the last antecedent, viz.: "my leasehold property," and are not to be extended to the more remote antecedent, "my lands for ever;" for the gift those words contain is complete and perfect in itself, and does not require any other words to give effect to it, for the purpose of denoting either the thing given or the intended donee, and may, therefore, in furtherance of the manifest intention, be taken by itself, not qualified or restrained by the words that afterwards occur. For these reasons, we think the defendant is entitled to retain the verdict; and the *postea* must be delivered to him.

Judgment for defendant.

REX v. DUGGER.—p. 791.

A warrant issued in pursuance of a writ *de contumace capiendis*, stated that the defendant was attached for non-payment of costs in a cause of appeal and complaint of nullity lately depending in the Arches Court of Canterbury: *Held*, that this warrant was insufficient, in not stating with certainty the nature of the cause, so as to show that it was one apparently within the jurisdiction of the Ecclesiastical Court.

SELWYN had obtained a rule nisi for a habeas corpus, to bring up the body of the defendant, on the ground of a defect in the warrant of commitment. It appeared that the defendant was in custody under a warrant of the sheriff of Cornwall, issued by virtue of a writ de contumace capiendo, and commanding the officer "to attach R. Dugger, until he shall have made satisfaction for manifest contumacy, and contempt of the law and jurisdiction ecclesiastical, in not obeying his majesty's lawful commands, by paying, on a day now long past, to J. J. Austen, or to his proctor, 202*l.* 8*s.* 5*d.*, being the amount of costs taxed in a certain cause of appeal and complaint of nullity, lately depending in the Arches Court of Canterbury, between J. J. Austen, appellant, and R. Dugger, appellate." It was objected, first, that it did not appear, on the face of the warrant, that the suit between Austen and the defendant was one within the jurisdiction of the ecclesiastical court; and, secondly, that no addition was given to the defendant's name in the warrant. On showing cause, the significavit was produced, in which the defendant was described as "cooper."

Carter showed cause. The writ de contumace capiendo is given by the 53 G. 3, c. 127, in lieu of the writ de excommunicato capiendo, against any person who shall not obey the lawful orders or decrees of the Court; and it is expressly provided, that it shall have the same force and effect as that writ, and that all rules and regulations, not thereby altered, applying to that writ, shall extend to the writ de contumace capiendo. Now, it is true that it has been held, that where the writ de excommunicato capiendo has been issued in an original suit, it must appear on the face of the writ that the suit was within the jurisdiction of the ecclesiastical court. But here the costs appear to have been taxed upon an appeal, which distinguishes this from all other cases on the subject. The very ground of appeal might have been, that the party promoting the suit in the court below had instituted the suit for a matter not of ecclesiastical jurisdiction. And the description of the cause, viz. a cause of appeal and complaint of nullity, is the usual and technical description of causes in proceedings in courts of appeal. This appears from the precedent of sentences of courts of appeal, and of a commission of appeal, which are to be found in the Clerk's Instructor in the ecclesiastical courts, where the cause is stated in this general form. As to the second objection, the addition is only required by statute 5 Eliz. c. 23, and the provisions of that statute are not to be followed, unless the suit be for one of the nine causes there stated. And so it was held in *Regina v. Sangway*, 1 Salk. 294. Besides, here, the defendant is described as "cooper" in the significavit, and it is therefore most probable, that this description is followed in the writ itself, though it does not appear on the warrant.

Selwyn, contra. This may, for anything that appears, have been a suit for one of the nine causes in the statute; and then, it is clear, an addition would be necessary. But the first is the main objection. Here the statement is much too loose and uncertain. In *Rex v. Fowler*, 1 Salk. 293, the return was, that the defendant was imprisoned, under a writ de excommunicato capiendo, for certain causes of subtraction of tithes, or other ecclesiastical rights; and it was quashed, on the

ground, that the "other rights" might be matters out of the jurisdiction, and that it ought to be shown that the matters were within the jurisdiction; for, of that the king's courts were to be judges. *Regina v. Hill*, 1 Salk. 294, is an authority to the same effect, and in *Regina v. Dr. Watson*, 2 Ld. Raym. 817,* it was held to be necessary to show the nature of the suit in the Court below, in order that this Court might award the proper process; which varies according as the suit below is or is not for one of the nine causes mentioned in the statute 5 Eliz. cap. 23, and in that case the proceedings took place upon an appeal. For, from the report in Lord Raymond, it appears that Dr. Watson was arrested upon an excommunicato capiendo, being excommunicated for non-payment of costs, in which he was condemned by *commissioners' delegates*; and yet, there, a similar objection was taken to the present, and prevailed.

Cur. adv. vult.

ABBOTT, C. J, now delivered the judgment of the Court. This was an application for a habeas corpus, to bring up the defendant, in order that he might be discharged out of custody, on the ground of a defect in the warrant of commitment. It appears, on the face of the warrant, that he was committed for contumacy, in not paying the taxed costs in a cause of appeal and complaint of nullity, then lately depending in the Arches Court of Canterbury: and it is contended, that this does not sufficiently show that the cause was one of ecclesiastical jurisdiction. This writ de contumace capiendo was first given by the 53 G. 3, c. 127, and thereby made subject to all the rules and regulations applying to the former writ de excommunicato capiendo. Now, the principle to be collected from the several decisions upon that writ is this, that it must appear to the Court, upon the face of the proceedings, that the party was condemned in costs in a suit respecting a subject-matter apparently within the jurisdiction of the ecclesiastical court. Our doubt, yesterday, arose on the ground, that this was the case of an appeal; and, although *Regina v. Dr. Watson* was probably the case of an appeal, yet that fact does not very distinctly appear from the report in Lord Raymond. But we have since found the case of *Rex v. Eyre*, 2 Str. 1189, where the suit appeared from the significavit to have been an appeal and complaint of nullity, which is exactly similar to the present. And in another case, of the same name,† two significavits were quashed, being only said to be in a cause of appeal concerning a matter merely spiritual; and Lord TALBOT is there reported to have said, "We are not to lend our assistance, but where it appears clearly that they have jurisdiction, and are not to trust them to determine what is a matter merely spiritual." Upon these authorities, which are not distinguishable from the present, we think that it does not sufficiently appear here, that this was a writ issued in a cause within the jurisdiction of the ecclesiastical court; and that the rule for a habeas corpus ought to be made absolute. Rule absolute.‡

* And see same case, 7 Modern, 56, where it appears clearly that that was the case of an appeal.

† 2 Str. 1067.

‡ The defendant in this case was afterwards brought up before a Judge at Chambers and discharged.

IRWINE v. REDDISH.—p. 796.

A Judge's certificate under 43 Eliz. c. 6, is sufficient to deprive a plaintiff of costs, notwithstanding the action be brought under 11 G. 2, c. 19, s. 19, by which, in case the plaintiff obtains a verdict, he is entitled to full costs.

ACTION on the 11 Geo. 2, c. 19, s. 19. The first count charged the defendant with not having given notice of the place to which the goods distrained were removed. The second count, with not selling the goods distrained to the best advantage. At the trial, the plaintiff obtained a verdict, damages 1s., and the Judge certified, under the 43 Eliz. c. 6. A rule had been obtained, calling upon the defendant to show cause why the plaintiff should not have his full costs, notwithstanding the Judge's certificate.

Campbell now showed cause. The words of the 43 Eliz. c. 6, s. 2, are prospective, for they extend "to all personal actions to be brought." The case of *Williams v. Miller*, 1 Taunt. 400, is an authority in point. That was an action on the statute 34 Geo. 3, c. 23, for copying and selling a pattern of a calico print, of which the plaintiff was proprietor; the statute expressly gave the plaintiff such damages as a jury should assess, together with *costs* of suit, yet it was held, that the Judge's power to certify, under the 43 Eliz., was not thereby taken away. Here the statute gives full costs, but that can make no difference.

D. F. Jones, contra. The Judge has no power, under the 43 Eliz. c. 6, to certify so as to deprive the plaintiff of his costs, in an action founded on the 11 Geo. 2, c. 19, s. 19. The intention of the 43 Eliz. c. 6, was, to prevent actions being brought in the superior courts, which might and ought to be brought in the county, or other inferior courts. Before the 11 Geo. 2, c. 19, trespass *vi et armis* was the proper form of action for a distress irregularly conducted; the landlord was then considered a trespasser *ab initio*, and the tenant was entitled to recover the full value of the goods distrained. The action of trespass *vi et armis* could not have been maintained in the county court, that court having no power to assess a fine.* The fair inference then is, that the legislature did not intend the action given by the 11 Geo. 2, c. 19, s. 19, in lieu of the former remedy, by action of trespass, to be brought in the county court, where the former remedy could not have been had. Besides, that statute gives the plaintiff his option of an action of trespass, or on the case; and the power given to him of bringing trespass, seems to show that it was not intended the action should be brought in the inferior court. Further, the statute in question expressly gives *full* costs of suit, and it gives different directions as to the costs to be recovered in certain specified cases. When, therefore, in the clause in question *full* costs are given, it must be taken to be costs of increase, and not mere nominal costs; and there is good reason for this construction, for, before the statute, the plaintiff would have recovered the full value of the goods, which would, in almost every

* 2 Inst. 311, 4 Inst. 266.

case, exceed 40s., and, therefore, the Judge would have had no power to certify. The statute 11 Geo. 2, while it limits the damages to be recovered to the amount of the injury consequent upon the irregularity, intended to place the tenant in no worse situation with regard to the costs. The case of *Williams v. Miller* is clearly distinguishable from the present; for there the statute in the section referred to gives costs in the ordinary way, and in another section, expressly gives *full* costs; which shows, that, where the legislature intended *full* costs, they so expressed it, and by *costs*, merely intended ordinary costs, liable to the ordinary power of limitation, by the certificate of the Judge.

Per Curiam. The case of *Williams v. Miller* is an authority to show, that, where a statute, passed subsequently to the 43 Eliz. c. 6, gives an action, with costs of suit, the Judge's power to certify, under the latter statute, is not taken away. In this case the statute gives *full* costs; but that cannot make any difference, for no distinction is known in the law between costs and *full* costs, and in point of practice, there is no difference in the mode of taxation. If the legislature had intended, by the 11 Geo. 2, to repeal the 43 Eliz. they would have done it in express terms.

Rule discharged.

REGULA GENERALIS.—p. 799.

Easter Term, 8 Geo. 4.

To prevent unnecessary expense to plaintiffs suing in this Court, in case of notice given by prisoners of their intention to apply for their discharge under any act made for the relief of insolvent debtors, It is ordered, that after such notice given to any plaintiff, no prisoner shall be superseded or discharged out of custody at the suit of such plaintiff, by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of this Court, from the time of such notice given until some rule or order shall be made in the cause in that behalf by this Court, or one of the Judges thereof.

And it is further ordered, That a copy of this rule shall be hung up in the King's Bench prison, in the place where rules of this Court are usually hung up.

By the Court.

END OF EASTER TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
Trinity Term,
IN THE

Third Year of the Reign of GEORGE IV., 1822.

JOHN JAMES BEARD v. WESTCOTT, JOHNSON,* JOHN CARUTHERS, THOMAS COMBES and MARY his Wife, JOHN CARUTHERS the Younger, an Infant, MARY ANN COMBES, and ELIZABETH COMBES, Infants.—p. 801.

Devise to A. for 99 years, if he should so long live; remainder to his first son, then unborn, for 99 years, if he should so long live, and so on in tail male to such first son, lawfully issuing for ever, and for want and in default of such issue of such first son, to the second and other sons successively for 99 years only, in case he should so long live; and that such elder son, or the issue of such elder son, should have no greater estate than for 99 years, determinable at his decease; and if there should be no issue male of A. at the time of his (A.'s) death, or in case there should be such issue male at that time, and they should all die before 21 without issue male, then to B. for 99 years, if he should so long live, remainder to the first son of B. for 99 years, if he should so long live, &c.: *Held*, that A. took under the will an estate for 99 years, in the freehold estates, determinable with his life, and the same estate in the leasehold, if they should so long continue, and that upon his death, his first son would take an estate for 99 years in the freeholds, determinable with his life, and the remainder of the terms in the leaseholds; but, that the limitations to the second and other unborn sons of A. were void as tending to perpetuity; and the limitations over to B., &c., after these void limitations, were not accelerated, but were void also

THE following case was sent by the Lord Chancellor for the opinion of this Court. John James was, in his lifetime, and at the times of making his will, and of his death, seized in fee simple of divers freehold estates, and also possessed of divers leasehold estates for long terms of years, and made his will, duly executed and attested, for passing real estates, whereby he devised a particular estate, consisting

* Westcott and Johnson were guardians of the infants.

of freehold and leasehold lands, unto his grandson John James Beard and his assigns, so that he and they might receive and take the rents, issues, and profits thereof, to his and their use, during the term of 99 years, if he should so long live, subject to the provisoes, conditions, and considerations thereafter mentioned: and immediately after his decease, then to the first son of his body, lawfully to be begotten, and his assigns, to receive and take the yearly rents thereof, to his and their own use, for the like term of 99 years, if he should happen so long to live, and so on in tail male to such first son lawfully issuing for ever. And for want and in default of such issue of such first son, then to the use and behoof of the second and all and every other son and sons of John James Beard, severally, successively, and in remainder, one after another, as they should be in seniority of age and priority of birth, and the issue male of such son or sons, lawfully issuing, for the like term of 99 years only (in case he should so long live;) and that such elder son, or the issue of such elder son, should have no greater estate than for the term of 99 years, determinable at his decease, and the elder son of such issue male always to take place before the younger of such son and sons, and the issue male of his and their bodies lawfully issuing, subject to the provisoes and conditions therein mentioned: And in case there should be no issue male of the said John James Beard, nor issue of such male at the time of his death, or in case there should be such issue male at that time, and they should all die before they should respectively attain 21, without lawful issue male, then there were similar limitations over to Joseph Beard (the brother of John James Beard) and his sons, and issue male, with a similar gift over, in case there should be no issue male of Joseph Beard, &c., to his grand-daughters, Elizabeth Beard and Mary Beard, sisters of John James Beard and Joseph Beard, and their assigns, to receive and take the rents, issues, and profits thereof, to their sole use and benefit (whether sole or covert) as tenants in common, and not as joint-tenants, during the term of 99 years, if they should so long live, and after their respective deaths, then to the first and other son and sons of their respective bodies, to receive the rents of the said premises, according to their respective interests of their mother, father, or grandmother, for the term of 99 years only, in case they should so long live, and so on toties quoties for ever; and in case there should only be one son of the bodies of Elizabeth and Mary Beard, then to such only son and his assigns, during the said term of 99 years, if he should so long live, and immediately after his decease, then to the first son of that son and his son, for the like term of 99 years only, if he should so long live; and that no issue male of his said grand-daughters, or their respective issue, should take any greater estate or interest therein, than for 99 years at any one time, and so on for ever. There were similar limitations over in like manner, to daughters of his four grand children. Then he gave another estate in like manner, giving the preference to Joseph Beard, and his issue. Then he gave another estate to Elizabeth, and her assigns, for 99 years, in case she should so long live; and after her decease, he gave the same to all and every the children of Elizabeth that should be living at the time of her death, and their respective assigns.

as tenants in common, for the like term of 99 years, if they should so long live; and in case of but one such child, then to such only child, his or her assigns, for the like term of 99 years, if he or she should so long live, and so on to their issue; and there was a like devise of another estate to the other grand-daughter.*

John James, soon after the date and execution of his will, died so seized and possessed of such of his said freehold and leasehold estates without having revoked his will. John James Beard, the plaintiff, is the grandson and heir at law of the testator. Joseph Beard, brother of the plaintiff, and another of the devisees, survived the testator, but died in February, 1804, at the age of 19 years, leaving one only son, who is since dead, an infant. Elizabeth Beard, another of the devisees, survived the testator, and afterwards intermarried with the defendant, John Caruthers, and died after attaining 21, leaving the defendant, John Caruthers the younger, an infant, her only child. Mary Beard, another of the devisees, intermarried with the defendant, Thomas Combes, and is still alive, having two daughters, namely, the defendants Mary Ann Combes and Elizabeth Combes. At the time of the testator's death John James Beard had attained 21; but Joseph Beard, Elizabeth Beard, and Mary Beard, the other grandchildren, were all infants. All of them, including John James Beard, were at that time unmarried. The following questions were submitted by the Lord Chancellor for the opinion of this Court.

First, what estate and interest did John James Beard, the grandson and heir at law of John James the testator, take in the freehold estates, and what estate and interest in the leasehold estates and under the testator's will?

Secondly, whether all or any, and which of the limitations in the testator's will subsequent and expectant upon the limitation to John James Beard, for 99 years, if he should so long live, were void and contrary to law; or whether any, and which of such limitations were good and effectual, and particularly with reference to the circumstance that the limitations over (in the event of their being no son or sons of John James Beard, nor issue male of such son or sons living at the death of the said John James Beard, or there being such issue male at that time, they should all die before they attained their respective ages of 21 years without lawful issue male,) were to take effect at the end of a term of 21 years after a life in being, at the death of the testator, without reference to the infancy of the person intended to take, and to the circumstance that there might be issue of John James Beard living at his death to whom the estate was given by the will, for whose death, under 21, the limitation over in the event before-mentioned, must await. This case was argued at the sittings before last Michaelmas term by

Sugden, for the plaintiff. There are two questions in this case; first, whether a gift for twenty-one years in gross, after a life in being, without reference to the infancy of the person who is to take, is void,

* See the will set out at length in 5 Taunt. 393.

as tending to a perpetuity; and, secondly, assuming the gift to Joseph Beard, standing by itself, to be valid, whether it and all the other limitations over, after the gift to the first unborn son of John James Beard are not void. Here the gift is to John James Beard for 99 years, if he shall so long live, and, after his decease, the second gift is to his first son, lawfully to be begotten, for the like term of 99 years, if he shall so long live, and to the issue in tail; but every one was to take for 99 years only, and then, *in default of the issue of his first son*, to the second, third, fourth, and other sons, and their issue in tail, for the like estate. Now, the first gift to John James Beard is valid, being for a life in being; the second gift to his first son is also valid, because it must take effect within 21 years and a few months, see Sugden on Powers, 430, (allowed for gestation,) after a life in being; but the gifts over to the issue of the first son, of John James Beard, are void, because possibly they may not take effect within 21 years and a few months after the determination of the life in being, viz.: John James Beard; for, supposing John James Beard to die, leaving a son, and that son to marry at the age of 20, and die under 21, leaving a son; that son would not take the estate until he attained the age of 21 years; and, therefore, it would be unalienable until that time. The estate, therefore, would, by force of the limitations, be unalienable during the life of John James Beard, and if he died while his son was an infant of the age of one year, it would continue unalienable during the whole of his infancy, that is, for nearly 20 years, and if the latter married at 20 years of age, and died under 21, it would continue unalienable during the life of that son, which would therefore be for a period of nearly 40 years after a life in being. The gift, to the second and other sons of John James Beard, in default of the issue of his first son, is of course too remote and void, as tending to a perpetuity. The will then contains a clause that, "in case there shall be no issue male of J. J. B., nor issue of such issue male at the time of his death, or in case there should be issue male at that time, and they should all die, before they attain 21, without lawful issue male, the estate is to go to Joseph Beard, and his sons. There is no case in which it has been held that an executory devise may be limited to take effect 21 years after a life in being, without reference to the birth and infancy of the devisee who is then to take. The reason why 21 years and a few months are in such cases allowed as the period during which an estate may be unalienable is, in *Stephens v. Stephens*, Cas. tem. Talb. Forrester, 232. Vivian's MS. Lincoln's Inn Library, expressly stated to be, that strictly the power of alienation would not be restrained longer than the common law would otherwise restrain it, viz.: during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity. In *Long v. Blackall*, 7 T. R. 102, Lord KENYON says, "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the Courts have said that the estate shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance. In marriage settlements the estate may be limited to

the first and other sons of the marriage in tail, and until the person to whom the last remainder is limited is of age, the estate is unalienable." In *Crooke v. De Vandes*, 9 Ves. jun. 197, a legacy given to the nephews and nieces of the testator, if at the end of 30 years from his decease, neither of his two grandsons (both living) had any grandchild living, was considered to be too remote, and therefore void. In *Thelluson v. Woodford*, 4 Ves. jun. 337, Lord Alvanley said, "As to the period of 21 years, it has never been considered as a term that may at all events be added to an executory devise or trust. I have only found this dictum, that estates may be unalienable for lives in being, and 21 years, merely because a life may be an infant, or en ventre sa mere." These are authorities to show, that the period allowed by law, during which an executory devise may be limited to take effect, is derived by analogy from the period allowed in case of strict settlement. An executory devise, therefore, cannot be limited to take effect at the expiration of a term in gross of 21 years and a few months, after lives in being. For then the devisor would take the chance of the person who shall then become entitled, being an infant; in which case the power of alienation would be restrained longer than it would in the common case of a strict settlement.*

Secondly, assuming the gift to Joseph Beard to be good, standing by itself, still it and all the limitations over after the gift to the first unborn son of John James Beard, are void, because it was the intention of the testator that those limitations should take effect, only in case the previous limitations were capable of taking effect and had failed. The decisions in the case of an excessive execution of a power, bear strongly upon this question. If a limitation be void as not authorized by the power, the remainders dependent upon it, which if given immediately, would have been good, are not accelerated, but the limitations over are prevented from taking effect. *Alexander v. Alexander*, 2 Ves. 640; *Robinson v. Hardcastle*, 2 T. R. 241; *Brudnell v. Elwes*, 1 East, 442; *Routledge v. Dorril*, 2 Ves. jun. 357. In this last case Lord Alvanley observes, "it would be monstrous to contend, that though it was appointed to the remainder-man, in failure of the existence of persons incapable of taking, yet notwithstanding they exist, he should take as if it was well appointed to them, and they had failed. It is given upon a contingency, upon which there was no right to give it." *Crompe v. Barrow*, 4 Ves. 681, is distinguishable from this case. There the gift was in the alternative, viz. to an object of the power in one event, in another not to an object of the power, and it was held, that on the happening of the former event, the gift was good. The power was to appoint to children, and the appointment was as to a moiety to a daughter, and as to the other moiety to a son for life, and upon his death, for his wife and children, and in case he should die without leaving a wife or child, then as to that moiety, to her daughter. And it was determined, that although the appointment to the wife and daughter was void, yet that as the event did not happen upon which

* See this point more fully discussed in a note to Gilbert on Uses, p. 161, 3d edition.

that gift was to take place, it did not defeat the limitation over to the object of the power in the event provided for, and which did happen of the son's dying without leaving a wife or child surviving him. The same observation applies to the case of *Longhead v. Phelps*, 2 Black. 704. If, indeed, the limitations over were not wholly void, this consequence would follow, that there might be a person in esse entitled to take according to the words of the first limitation in the will, but incapable in law, and a remainder-man in esse capable of taking by law, but incapable of taking, because the contingency has not happened which was to determine the preceding estate. As for example, suppose the gift had been to J. J. B. for 99 years, if he should so long live; remainder to the first son for 99 years, if he should so long live; remainder over in like manner to his issue successively; remainder to the other sons and their issue for 99 years, determinable on their deaths; remainder to the heir at law of the testator, in fee, with an executory devise over as in this case, to Joseph Beard. Now, the estates to John James Beard and to his first son are good, but the estates to the issue of the son, and to all the other sons after failure of the issue of the first son, are void. Suppose that the first son of J. J. B. dies a month old, and then that he himself dies, leaving five sons, they and all their issue are cut out, because the limitations are too remote; but Joseph Beard is living, and desirous to take, yet is bound to wait the death of his five nephews without issue under 21. It may be laid down as a general rule, that where a preceding particular estate is void on account of a perpetuity, the remainders dependent upon it are also void. It is clear that the testator intended the prior estate to endure until the period when the limitation over was to take effect. The will, therefore, must be read as if the testator had expressly said, "I never mean Joseph Beard to take in derogation of the rights of the persons to whom the estate is previously limited." In *Proctor v. The Bishop of Bath and Wells*, 2 H. Bl. 358, there was a devise of an advowson in fee to the first or other son of B., that should be bred a clergyman and be in holy orders, but in case B. should have no such son, then to C. in fee. The first devise was held to be void as depending upon too remote a contingency, because the first or other son of B. could not take holy orders until he was 24 years of age, and the devise over as depending on the same event, was held to be also void, and the Court said, that the will would not admit of the contingency being divided, as was the case in *Longhead v. Phelps*, and there was no instance in which a limitation after a prior devise which was void from the contingency being too remote, had been let in to take effect; but the contrary was expressly decided in the House of Lords, in the case of *The Earl of Chatham v. Tothill*, 6 Bro. Cha. Co. in Parl. 451. Although, therefore, no son was born, the devise over was held void.

Preston, contra. The 39 and 40 G. 3, c. 98, which passed in consequence of the case of *Thelluson v. Woodford*, 4 Ves. jun. 227, may be considered as containing a legislative declaration of the law upon the head of objection, namely, the term of 21 years; for that statute keeps within the boundary of the rule. It enacts, that no person

shall, by deed, will, or otherwise, settle or dispose of any real or personal property, so that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated, for any longer term than for the life or lives of such grantor, settlor, deviser, or testator, or the term of 21 years from the death of any such grantor, settlor, deviser, or testator, or during the minority of any person who shall be living, or en ventre sa mere, at the time of the death of such grantor, &c., or during the minority of any person or persons, who, under the uses or trusts of the deed, will, or other assurances, directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest or annual produce so directed to be accumulated." This is a legislative declaration that property may accumulate during a life in being, and 21 years after the death of the grantor, &c. A new qualification is now attempted to be engrafted on the rule, that the 21 years must be in respect of and during the minority of the beneficial owner; but if a settlor may select a person who cannot alienate for 21 years, it follows, that the period during which the property may be unalienable, may be a term of 21 years in gross, without any reference to the minority of the next taker. The opinion of Lord Alvanley, in *Thelluson v. Woodford*, against such direct period of accumulation, is a mere *obiter dictum*, not warranted by any authority, and opposed to those judicial opinions which allow that there may be a trust of accumulation, or a suspense of ownership, for 20 or even 30 years. There are two sorts of gifts, viz. : gifts to take effect by way of remainder, and gifts to take effect by way of substitution, or executory devise. A gift like the present might be too remote, if it were to take effect by way of remainder : but it does not therefore follow that it may not be good by executory devise, if it may operate in that mode. It may be admitted, that life-estates to persons in esse, cannot be limited, except for lives in esse; nor can there be a perpetual series of life-estates; therefore, an estate cannot be limited to A. for life, remainder to his first (unborn) son for life, remainder to a grandson, being the son of such first son, for life, or even in tail or in fee, so as to be valid in favour of the grandson. In the case before the Court, the subsequent gifts are not remainders. They are limitations for a term of years, determinable, and therefore may operate by way of executory devise; and it is clear, that every executory devise which may vest within the period of a life or lives in being and 21 years, is good. In *Scattergood v. Edge*, 1 Salk. 229, it was held, that an executory interest to arise within a reasonable time was good, and that 20, nay 30 years had been thought a reasonable time. So it is, if within the compass of a life or lives, for let the lives be ever so many, there must be a survivor, and it is, at the utmost, only the length of that life; and LAWRENCE, J. in *Thelluson v. Woodford*, 4 Ves. jun. 313, lays down the same rule. In *Gee v. Audley*, 2 Ves. jun. 365, there was an appointment by will of 1000*l.*, in default of issue of Mary Hall, equally to be divided between the daughters living, (viz. at the failure of issue) of John Gee and Elizabeth his wife. Lord Kenyon said, "that neither real nor personal estate can be so settled as to be tied up beyond lives in being,

and 21 years and a few months afterwards; that if the expression in that will had been daughters 'now living,' or 'living at my death,' it would have been good; but that as it stood, it might be to those born afterwards. The vices of this gift were the contingency, and the possible suspense for more than 21 years after the death of a life in being."

Secondly, Assuming the limitations to all the unborn sons except the first, are void, then the limitations to Joseph Beard, and the subsequent limitations, as far as they are within the compass of the rules against perpetuities, are accelerated, and Joseph Beard was entitled to take immediately on the determination of the estate limited to John James Beard and his first son. Besides, even though this gift be in itself too remote, and therefore void as far as it is by way of remainder, it may be good and have effect in the contingency which is expressed, being an event which is within the limits of the rule against perpetuities. In *Longhead v. Phelps*, 2 Sir W. Black. 704, a trust of a term to arise on a contingency, that A. and B. should die without leaving issue male, or that such issue male should die without issue, was held to be too remote in one event, and good in the other event, (being the event which happened,) viz.: A. and B. having had a son, who died without issue in the lifetime of the survivor. And in *Crompe v. Burrow*, 4 Ves. jun. 681, it was decided, that an appointment which exceeded the power by a limitation to objects not within the power, was void only as to the excess. The power was to appoint to children, and the appointment was to a child for life, and after his decease, to his wife and children. That void limitation, however, did not defeat or exclude a limitation over to an object of the power, limited expressly on the event that such child should die without leaving a wife or child surviving him. This case is an authority to show, that a void limitation does not defeat a subsequent limitation, which is by express language brought within the limits of the rule against perpetuities. That is precisely the same case as this, for, in this case, the express provision, that there shall be no issue of such issue male living at the time of his (John James Beard's) death; also the contingency in case there shall be such issue male at that time, and they shall all die before they respectively attain their respective ages of 21 years, without lawful issue male, severally give the property in an event which does not infringe on the rule against perpetuities; consequently no rule of law, connected with the learning of perpetuities, denies effect of such a gift.

Cur. adv. vult.

The following certificate was afterwards sent:

This case has been argued before us, and we are of opinion, that John James Beard, the grandson and heir at law of John James the testator, took, under the said testator's will, an estate for 99 years, determinable with his life, in the freehold estates devised to him, in the first instance; and also in the leasehold estates devised, if they should so long continue, and that, upon his death, leaving one or more sons, his first son will take an estate for 99 years, determinable with his life, in the freehold estates, and what shall then remain of the terms for which the leasehold estates are held. We are also of opinion, that all the li-

mitations subsequent and expectant upon the limitation to the first son of John James Beard, are void.

C. ABBOTT,
J. BAYLEY,
G. S. HOLROYD,
W. D. BEST.

KILSBY v. WILLIAMS and Others.—p. 815.

A plaintiff paid into his own bankers, a cheque of 250*l.*, drawn upon them by a third person, which they received without any objection; and in the course of the same day the drawer of the cheque paid in a sum of money, part of which he particularly appropriated, leaving a balance unappropriated of 237*l.* The bankers, who were then creditors of the drawers to a large amount, wrote on the next morning, to the plaintiff, stating, that the cheque was not paid, but that they would keep it in the hope of there being money to pay it; and on that day a further unappropriated balance was paid in, making altogether a sum exceeding the plaintiff's cheque: *Held*, that under these circumstances, the plaintiff might maintain money had and received against the bankers, and that the latter, being his agents for receipt of the money, could not appropriate the balance to the payment either of their own general account against the drawer, or of two cheques presented on the same day, but subsequently to that of the plaintiff, and paid by them.

ASSUMPSIT upon the usual money counts and an account stated. Plea, general issue. At the trial at the Guildhall sittings after last Easter term, before ABBOTT, C. J., it appeared that the defendants were the bankers, both of the plaintiff and one Robertson, and that on the 13th November, 1821, the plaintiff paid in at the defendants' counter, a cheque of Robertson on them for 250*l.* The cheque was received by their clerk without any thing being said, or any entry made. In the course of the same day Robertson paid in bills for 1600*l.*, the produce of which he expressly appropriated to the charges of the day. This produce, after deducting the discount, amounted to 1579*l.*: the charges consisted of bills accepted by Robertson to the amount of 1342*l.* These were paid, and on the 13th November two cheques of Robertson, for 50*l.* each, were also paid. On the 14th of November, the defendants wrote a letter to the plaintiff, stating, that the 250*l.* cheque was not paid, and that they would keep it, in the hope of there being money to pay it, and they promised Robertson also to pay it when they had funds. On the 14th, Robertson paid in different sums of money, part of which was by him specifically appropriated to certain payments, leaving, however, an unappropriated balance of 93*l.* On the 15th November, Robertson became bankrupt. During all these transactions, the defendants were in advance themselves to Robertson upwards of 9000*l.* The Lord Chief Justice left it to the jury to say, whether the cheque for 250*l.* was presented on the 13th, before the two cheques for 50*l.* each, which the jury found in the affirmative; and he directed them in that case, to find for the plaintiff, on the ground, that on the 14th November, they had, exclusively of their own account, a balance of more than 250*l.* due to

Robertson in their hands, and that under the circumstances, they had no right to appropriate that balance in reduction of their own account. The jury accordingly found a verdict for the plaintiff, damages 250*l*. And now,

Campbell moved for a new trial, and contended, that here there was no specific appropriation by Robertson of this money, to the payment of the plaintiff's check, and therefore, the defendants had a right to appropriate the balances of 237*l*., and 93*l*., to the reduction of their own account, *Williams v. Everett*, 14 East, 582. In *De Bernales v. Fuller*, 14 East, 590, the money was specifically paid in to discharge a particular bill; and therefore, the Court held, that an action would lie against the bankers there, who being the persons with whom the bill was deposited, were to be considered as the holders' agents for receiving the money due upon it. But that is not the case here. The promise in the defendants' letter, that they would hold the check in the hope of there being money to pay it, could only mean that they would keep it, and when their own balance was discharged, would appropriate the next money paid in by Robertson, to the discharge of this check. But, secondly, they had a right to take into account, the two checks for 50*l*. paid on the 13th, and then, even if the balance of the 14th be added, there will only be a balance of 230*l*. in their hands. And, unless they had the full amount of 250*l*. in their hands, they were not bound to pay the check. Now it is clear, they had a right to deduct the payments of the two checks for 50*l*. For they were paid prior to the letter written by the defendants, and were part of the charges of the day to which the sum of 1579*l*. was subjected. And the circumstances of their being paid in subsequently to the one for 250*l*. cannot affect the question. Till the end of the day the bankers could not tell whether the check for 250*l*. would be honoured at all. For, till then, they could not tell what sums Robertson would pay into his account, or what drafts he might make on them in the course of the day. If this rule be not adopted, it will render it necessary for bankers in future to file their checks as received, in order to ascertain their priority, and they will not be able to pay any in the course of the day, except at their own risk. This may produce serious evil to individuals, whose credit may be affected by the bankers' hesitation to pay their drafts. Here, the bankers were the plaintiff's agents to receive the money for this check, in case Robertson had paid in any specifically for that purpose. But he paid it in generally, and then they had a right to set it off against their general balance.

ABBOTT, C. J. It is found as a fact by the jury in this case, that prior to the payments made by the defendants on the 13th of November, the cheque in question was presented to them. At that time Robertson owed them a large balance, and the question is, what was the effect of the presentment under such circumstances? At the outset of this cause, I thought it was the duty of bankers under such circumstances, immediately to tell the person presenting a cheque for payment, that they had no sufficient funds to honor it. But it was urged by Mr. *Scarlett*, and I thought there was great weight in the argument,

that this might be productive of serious inconvenience, inasmuch as it is often impossible to ascertain till the close of the day at the clearing house, what sums of money may be paid in to each particular account, and what are the drafts upon it. I think, therefore, that the defendants might, in this case, receive the cheque in question, subject to its being honored, or not, according to the course of Robertson's dealing with them in that day. Now, on that day, Robertson discounted with them bills to the amount of 1579*l.*, which sum he directed should be applied to the charges of that day, and after providing for the three Manchester bills, there remained, unappropriated, the sum of 237*l.* So the account stood on the 13th, exclusive of the two cheques of 50*l.* each, which the jury have found were presented subsequently to the cheque in question. And if the balance, instead of being 237*l.*, had exceeded 250*l.*, I should have had no doubt that the defendants were bound to appropriate it to the payment of the plaintiff. For when they received the cheque from him, they became his agents to receive the money upon it as early as possible, and if they could be allowed to appropriate the money received by them to the payment of subsequent cheques, it would be doing great injustice and injury to their own customer. But I doubted at the trial, whether they would be bound to pay the cheque in part. On the 14th of November, however, a letter is written by them, in which they state that the cheque was not paid, and that they would keep it in the hope of there being money to pay it. In the course of that day money was paid in, part of which was specifically appropriated, leaving a balance unappropriated of 93*l.* This sum being added to 237*l.* exceeds the amount of the cheque in question; and I think, that under these circumstances, the defendants were liable to pay it, in preference both to the two of 50*l.* each, and to their own balance. I am therefore of opinion, that the verdict is right.

BAYLEY, J. I am of the same opinion. The case of *De Barnules v Fuller* decided, that where a customer paid in money to be applied to take up a particular bill deposited with the banker, and the banker appropriated it to the payment of his general balance, the holder of the bill might maintain money had and received for it. For being the agent of the holder, he must exert the same vigilance as the holder himself would have done. Here, on the morning of the 13th November, the cheque was paid in by the plaintiff, and from that moment the defendants became his agent to receive the money upon it. If the defendants had not been the plaintiff's bankers, he would have immediately demanded the money due upon the cheque, and then they must have either paid him, or if they had refused payment, he might have had immediate recourse to Robertson. In either case he would have had the advantage of the priority of his presentment over the holders of the two cheques for 50*l.* each. Now he ought not to be placed in a worse situation, because he was a customer of the defendants. At the end of the 13th November, the balance unappropriated was 237*l.* excluding the two cheques for 50*l.* for the reason which I have before given, and if the case had stopped here, the plaintiff would only have been entitled to a verdict for that amount. But then on the 14th of Novem-

ber, a similar balance of 93*l.* unappropriated was paid in by Robertson, which made a sufficient fund for the payment of the plaintiff's demand. I think that these sums could not legally be appropriated by the defendants to the payment of their own balance, or to that of cheques subsequently presented. The verdict, therefore, is right.

HOLROYD, J. I am of the same opinion. The bankers received this cheque from the plaintiff without any objection, and they were, therefore, bound, as agents for the plaintiff, to apply in payment of it the first money received from Robertson, not specifically appropriated by him to the payment of other demands. And I think, therefore, that they were bound to pay it in preference to other cheques, subsequently presented, and also to the balance due from Robertson to themselves.

BEST, J. As to the balance of 93*l.*, it is clear that the defendants were bound to apply that in payment of the plaintiff's cheque, in consequence of their own letter, by which they undertook, on the 14th, to apply any money coming in for that purpose. As to the other sum of 237*l.*, I entirely concur in the opinion pronounced by the rest of the Court.

Rule refused.

BULMER v. MARSHALL, Garnishee.—p. 821.

The 19 G. 3, c. 70, s. 4, is confined to those suits in inferior courts where the proceedings are similar to those in the superior courts, and therefore, does not extend to the case of foreign attachment.

NORTON, in last Michaelmas term, had obtained a rule nisi for a writ of procedendo, to remove back the record of the judgment obtained in the Lord Mayor's court of the city of London, by the plaintiff, against the garnishee, the same having been removed into this court by certiorari. The affidavits stated, that the original suit was commenced in August, 1818, by the plaintiff, against Thomas Broster, and thereupon an attachment was duly issued and laid in the hands of Marshall. On the 15th of May, 1821, final judgment was given in the attachment against Marshall for the sum of 150*l.* But he, not being found within the jurisdiction of the city, the writ of certiorari was in Easter term, 1821, obtained, removing the judgment into the Court of King's Bench, in order that execution might issue. The affidavits also stated, that in this case no satisfaction had been acknowledged in the record, and that, by the custom of foreign attachments, a garnishee or a defendant may, at any time before satisfaction acknowledged on the record, put in bail in the ordinary way, to dispute the validity of the plaintiff's debt; and even after the money is paid and satisfaction acknowledged, a defendant has twelve months and a day to bring his scire facias ad disprobandum debitum, upon which, if he succeeds, the plaintiff must restore the money received of the garnishee, as a security for which he must, by

the custom, give pledges. It was contended, in support of the rule, that the 19 G. 3, c. 70, s. 4, did not extend to this case, the judgment in an attachment not being final, and being subject to three conditions; first, that the plaintiff shall find pledges to restore; secondly, that it may be dissolved by the garnishee or defendant putting in bail before satisfaction acknowledged; and thirdly, that the defendant may come in and dispute the debt within a year and a day: of all which advantages the parties would, by this proceeding, be deprived.

Bolland showed cause. The 19 G. 3, c. 70, s. 4, provides, that in all cases where final judgment shall be obtained, in any action or suit in any inferior court of record, the record may be removed. Now, these words are large enough to include the case of a foreign attachment, which is a suit in the Lord Mayor's court. And the case is clearly within the mischief; for here the defendant, if he were found within the jurisdiction, could be compelled to pay the money; but, in consequence of his not being so, the plaintiff is deprived of his remedy. It is said, that by this the defendant would be deprived of the advantage of coming in, within a year and a day, to dispute the debt. That is not so; for the money, when levied by virtue of an execution out of this Court, will be subject to the same conditions as if levied under process from the Court below; and if the defendant comes in and disputes the debt, the record may be then removed back by procedendo for that purpose.

Norton, contra, was stopped by the Court.

ABBOTT, C. J. This rule must be made absolute. The statute is confined to those suits in which the proceedings of the courts below are similar to those in this court. It speaks, in the preamble to the 4th section, of persons served with process issuing out of inferior courts, where the debt is under 10*l*. But here the party against whom we are to issue execution is not the original debtor; and the form of the execution issued by this Court is quite different from that in the Lord Mayor's court in the case of a foreign attachment. Upon the whole, I am of opinion that this does not come within the statute, and consequently, that the writ of certiorari in this case was improperly issued.

Rule absolute.

Ex parte WHATTON.—p. 824.

Where a bailiff had written to an attorney for writs, which the latter sent without knowing anything of the parties or circumstances; but the bailiff never represented himself, or had been considered as an attorney, nor looked for any profit upon the law proceedings: *Held*, that this was not a case within the 22 G. 2, c. 46, s. 11, but that it was a most improper practice which the Court, in virtue of its general jurisdiction over attorneys, would punish severely.

A RULE nisi had been obtained, calling upon J. W. Whatton, an attorney of this Court, to show cause why he should not be struck off the roll, for having acted as the agent of John Radford, a person not qualified to act as an attorney, and for permitting his, Whatton's name, to be used, upon the account and for the profit of Radford, and for

sending process to Radford, thereby making him to appear to act or practise as an attorney of this court, knowing him not to be qualified. The rule also called upon J. Radford to show cause why he should not be committed to the prison of this court. The 22 G. 2, c. 46, s. 11, recites, that persons not attorneys, do, in conjunction with, and by the contrivance of persons who are attorneys, intrude themselves into and practise in the business of attorneys, &c., &c., and then enacts, "that if an attorney shall act as agent for any person not duly qualified, or permit his name to be made use of upon the account of or for the profit of any unqualified person or persons, thereby to enable him to appear and act as, or practise in any respect as an attorney, knowing him not to be duly qualified, the attorney shall be struck off the roll, and the court may commit the unqualified person to the prison of the court, for any term not exceeding a year."

This case was heard last term, and the matter was referred to the Master, who now reported the following facts to the Court: Radford, who was a bailiff, had, upon several occasions, written to Whatton, the attorney, for writs, and the latter accordingly sent such writs, without knowing anything of the parties or the circumstances; but Radford never represented himself as an attorney, nor had been considered as such. He was well known to be a bailiff, and his offers to his employers had always been to collect debts for them, and (if necessary to sue for them) to employ an attorney. He never looked for any profit upon the law proceedings, but merely payment for the service of the writ. The attorney had no profit beyond the profit usually charged upon suing out the writ; and this he expected the bailiff to receive for him and account for.

ABBOTT, C. J. Upon the facts reported to us by the Master, we are of opinion that this is not a case within the act of parliament, but at the same time we think that this is a most improper practice. It is the duty of an attorney to communicate with his clients, and to give his attention to their concerns. If a bailiff be allowed to obtain writs in the manner stated in this report, the client will be wholly deprived of that attention which he ought to receive from the attorney; and although this case be not within the statute, still the Court, in virtue of its general jurisdiction over attorneys, have the power of restraining this practice; and if repeated they will be disposed to visit it very severely. But, as this is the first time that such a matter has been presented to the consideration of the Court, we do not think it right to order the attorney to be struck off the roll in this instance; but we think the purposes of justice will be sufficiently answered, by ordering that this rule shall be discharged, on payment of the costs by the attorney. Rule discharged on payment of costs, accordingly.

FARRANT *v.* THOMPSON.—p. 826.

Where certain mill-machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill; and it was afterwards seized under a *fi. fa.* by the sheriff, and sold by him: *Held*, that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during the continuance of the term.

TROVER for mill-machinery. At the trial, before ABBOTT, C. J., at the Middlesex sittings after Easter term, the following appeared to be the facts of the case. On the 10th of July, 1820, the plaintiff agreed, by an instrument in writing, to purchase of one Richard, for the remainder of a term of 99 years, certain premises at Cudham, in Kent, on which Richard had erected a wind-mill, with the appurtenances, the same having been demised to him for the term of 99 years, at a yearly rent therein mentioned; and the agreement contained a stipulation on the part of the plaintiff, to grant a lease of the premises to Richards, for the term of 30 years, at the yearly rent of 80*l.* The plaintiff paid the purchase-money, and Richards became his tenant, and paid rent according to agreement. In September, 1821, Richards offered to sell to the defendant, Thompson, part of the machinery of the mill, which he was then about to remove to Grays, in Essex. A day was fixed for bringing the machinery to Grays, and it was then agreed that Thompson and his millwright should meet Richards at Grays, for the purpose of purchasing the machinery. The machinery was severed by the tenant from the mill, and while on the road from Cudham to Grays was seized in execution by the sheriff under a *fi. fa.* at the suit of a third person, and the defendant afterwards became the purchaser, under the sheriff. It was contended at the trial, that the plaintiff was not entitled to recover, because the purchase by the defendant under the execution was equivalent to a sale in market overt, and that the property was thereby changed, and that the plaintiff ought to have brought his action against the sheriff for wrongfully selling the goods; and, secondly, that as the goods were in possession of the tenant under a demise, trover would not lie for them during the term. The plaintiff obtained a verdict; but the Lord Chief Justice gave leave to the defendant to move to enter a nonsuit, and

Scarlett now moved accordingly. This action is not maintainable against the defendant. Assuming that Farrant might have sued the sheriff or the plaintiff in the execution, still, the defendant being a bona fide purchaser without notice under a *fi. fa.*, is not liable. In *Manning's case*, 8 Co. 191, it was resolved that a sale by the sheriff by force of a *fi. fa.* should stand, although the judgment be afterwards reversed; for the sheriff who made the sale had lawful authority to sell, and by the sale the vendee had an absolute property in the term. In *Doe v. Thorn*, 1 M. & S. 425, it was held, that if a sheriff sell a term under a writ of *fi. fa.*, which is afterwards set aside for irregularity, and the produce of the sale be directed to be returned to the termor, the termor cannot maintain ejectment to recover his term against the vendee under the sheriff. But, secondly, the goods being in possession of the tenant, under a demise, trover was not maintainable. The tenant was entitled

to the use of them during the term, and the landlord cannot, therefore, maintain trover; he can maintain no action, except for waste or injury done to the inheritance. In *Gordon v. Harper*, 7 T. R. 9, the goods leased as furniture were wrongfully taken in execution by the sheriff; and it was held, that during the term, trover was not maintainable against the sheriff by the landlord, because the latter had not the right of possession. That case is expressly in point.

ABBOTT, C. J. I thought at the trial, and still think, that there is a material distinction between this case and that of *Gordon v. Harper*, 7 T. R. 9. In that case the goods removed were personal chattels, and the tenant had not by any wrongful act put an end to his qualified possession of them. Here, however, they consisted of machinery annexed to the mill, and former parcel of the inheritance, and, when wrongfully severed, became the property of the reversioner. As to the other point, the sheriff wrongfully took the goods of the plaintiff, instead of those of the tenant; he could acquire no title by his wrongful act, and could therefore convey no title to the defendant.

BAYLEY, J. I am of the same opinion. This case is distinguishable from *Gordon v. Harper* in two particulars; first, there the goods removed were personal chattels, and, at the time of the seizure, continued to be in the qualified possession of the tenant, which the lessor agreed the lessee should have. Here the goods were parcel of the inheritance, and let to the tenant to be used, during the term, in a particular way, viz.: in that particular place, and he, by his own act, put an end to that qualified possession. They are not in principle distinguishable from trees, which are parcel of the inheritance; to the use of which the tenant has only a qualified right during his term. If, however, they are separated by his own wrongful act, or the act of God, the tenant has no right to the use during his term, but they become absolutely vested in the person who has the next estate of inheritance. They then become his goods and chattels. Here the removal was intended to be permanent, and the chattels, when severed wrongfully, did not thereby become the property of the wrong-doer, but of the landlord.

HOLROYD, J. I think trover the proper remedy. The machinery was let together with the mill, and was part of the mill. It was a part of the inheritance until the demise was made; when the demise took place, it continued part of the inheritance of the landlord, and part of a chattel real in the hands of the tenant in possession. By the lease or agreement the tenant has the use, not the dominion, of the property demised: and, therefore, when he separated any part of it, to convert it from a chattel real to a chattel personal, his right of using it was at an end for any legal purpose, that right being only to use it in the state in which it was before. In the case of a lease of a house, if a tenant pulls down any part of it wrongfully, and not for the purpose of repair, so as to constitute waste, the person who has the first estate of inheritance has a right to the materials of which that house was before composed; and I apprehend he has a right to an immediate possession of those materials, in the like manner as he has a right to the immediate possession of timber, where it is severed from the inheritance. In that case when detached, either by the wrongful act of the tenant him-

self, or by the act of God, it immediately becomes the goods and chattels of the person entitled to the first estate of inheritance, and the right which had been for some time vested in the tenant has ceased. I think that the tenant's right was put an end to in this case by the separation of the machinery for an unlawful purpose, which was his own wrongful act: and that, being the goods and chattels of the landlord, as the person who had the first estate of inheritance in the mill, the tenant could have no right to use them as chattels personal, but only while they were part of the chattel real; and, upon the separation, the whole of the property became immediately vested in the landlord.

BEST, J., concurred.

Rule refused.

KOOYSTRA v. LUCAS and Others.—p. 830.

By lease granted in 1814, to take effect from 1820, certain houses, together with a piece of ground, which was part of an adjoining yard, were leased to the tenant, together with all ways with the said premises or any part thereof used or enjoyed before. At the time of granting the lease the whole of the yard was in the occupation of one person, who had always used and enjoyed a certain right of way to every part of that yard: *Held*, that the lessee was entitled to such right of way to the part of the yard demised to him.

DECLARATION stated that one John Heaton was seized in fee of the premises demised to the plaintiff, and of other premises, called Sprang's Dairy, with a certain yard thereto belonging with the appurtenances, situate in the parish of St. Mary-le-bone, and being so seized, on the 14th of January, 1814, by indenture between the said John Heaton of the first part, the Duke of Portland of the second part, and the plaintiff of the third part, the said John Heaton demised to the plaintiff certain ground, messuages, or tenements, and premises in the said indenture more particularly mentioned, comprising, and among other premises, a piece or parcel of ground, then part of the premises called Sprang's Dairy, together with all courts, yards, ways, &c., to the said demised premises belonging, or with any part thereof used or enjoyed, habendum to plaintiff for 33 years. Declaration then averred, that the plaintiff entered, and that long before and at the time of making the indenture, and whilst the said John Heaton was so seized as aforesaid, the occupiers for the time being of the said piece of ground so comprised in the said demised premises, and being part of Sprang's Dairy, had been used to have and enjoy a certain way from and out of the same piece or parcel of ground, through a certain shed, being also part of Sprang's Dairy, into and over the said yard, thence into, through, and along a passage or gateway, unto and into Oxford-street, and so from thence back again, into, through, and along the said passage or gateway, unto, into, through, and over the said yard, unto, into, and through the said shed, into the same piece or parcel of ground, for themselves and their servants, on foot and with cattle and carts,

and carriages, to go, return, pass and repass, &c., for the convenient use and occupation of the same piece or parcel of ground; by reason whereof, the plaintiff, as the occupier of the said piece or parcel of ground, was entitled to have, use, and enjoy the said way, &c.; yet the defendants put, placed, and deposited divers large quantities of timber, &c., upon certain parts of the said way, by which plaintiff had been obstructed in the use of the said way. In another count it was stated, that Heaton was seized in fee of certain premises called Sprang's Dairy, (comprising, amongst other things, the piece or parcel of land demised to the plaintiff,) together with a certain yard thereunto belonging, and being so seized, by indenture made, &c., demised, leased, and set unto the plaintiff, the said last-mentioned piece or parcel of land, amongst other premises, with the appurtenances, together with a certain way for himself, &c., and his assigns, occupiers of the said last-mentioned piece or parcel of land, with the appurtenances, and his and their servants, from the said public street, called Oxford street, unto, into, through, and along a certain other gateway, and from thence unto, into, through, over, and along the said last-mentioned yard, and from thence unto, into, and through, a certain other shed or building, part of the said last-mentioned premises, called Sprang's Dairy, into the said last-mentioned piece or parcel of land, and so back again from the same piece or parcel of land, through the said last-mentioned shed or building, unto, into, through, over, and along the said last-mentioned gateway, unto and into the said public street called Oxford street, to go, return, pass, and repass on foot and with cattle, carts, and other carriages. Plea, not guilty. At the trial, before ABBOTT, C. J., at the Middlesex sittings after last Easter term, the following facts appeared in evidence. The way claimed by the plaintiff was, from Oxford street, through a gateway, between the houses No. 71 and 72, on the north side of that street, to a yard behind those houses, in one corner of which, immediately behind the house No. 70, of which the plaintiff was the lessee, he had built a coach-house and stable. By lease of the 14th January, 1814, John Heaton, by the appointment of the Duke of Portland, demised to the plaintiff a piece or parcel of ground, with two tenements, No. 69 and 70, on the north side of Oxford street thereon, and therein described as abutting north upon Sprang's Dairy, in part: and as the same then were in possession of the plaintiff and Catherine Bagerly, (the ground plot of the premises being described as particularly delineated in the plan drawn in the margin thereof,) together with all ways, passages, &c., to the said premises belonging or therewith, or with any part thereof, used and enjoyed: habendum, from the 6th of July, 1820, (when the old leases would expire,) for 33 years. By the plan in the margin of the lease, the spot of ground upon which the plaintiff had built his coach-house and stables, was described as part of the premises demised under the name of "a cow-shed, part of Sprang's Dairy." On the 29th of April, 1814, Mr. Heaton, by the appointment of the Duke of Portland, granted to Messrs. Hayward, then of No. 73, Oxford street, a reversionary lease of the rest of the dairy, to commence on the 6th April, 1820, and there was no mention of any right of way having been reserved to the plaintiff. On the 18th March,

1820, Hayward granted Sprang (who had occupied the dairy for some years) a lease of that part of the dairy demised to them for the whole of their term, wanting five days, and reserved a right of way to the occupiers of No. 71 and 72, down the gateway. Sprang afterwards assigned his interest to the defendants. It appeared, that, at the time of the granting the lease in 1814, and for many years before, the yard in question had been in the possession of one person, who, of course, had used the gateway as a way for his horses and cattle to every part of the yard. The obstruction of the way was proved as laid in the declaration. The Lord Chief Justice was of opinion, that the plaintiff was entitled to the right of way claimed for himself and cattle to the spot of ground on which he had built his stable and coach-house, that being a part of the demised premises to which such a way had been used previously to 1814.

Gurney now moved for a new trial, and contended, that the plaintiff had acquired no such right of way by the terms of the lease in 1814. If the lessor had intended to grant such a right of way as that claimed, it would have been expressly mentioned in the lease. Now the premises demised, were described to be in the same condition as they were lately in the possession of the plaintiff and Catherine Bagerly. The spot of ground in respect of which the right of way is claimed, was not in the possession of the plaintiff before the new lease took effect, and he had no right of way whatever through the gateway to the back part of his premises in Sprang's dairy. There being no express mention of such a right of way, it could not have been the intention of the lessor to grant it.

HOLROYD, J.* I am of opinion, that by the terms of the lease in 1814, the plaintiff is entitled to a right of way through the gateway, to the piece of ground on which he has since built his stables. That piece of ground formerly constituted a part of the yard called Sprang's Dairy, and the occupier of that yard, before and at the time of granting the lease in 1814, used the gateway as a way to every part of the yard. By the lease, certain premises delineated in a plan in the margin thereof, comprising a part of Sprang's Dairy, were demised to the plaintiff, together with all ways thereto belonging or appertaining, or therewith, or with any part thereof used or enjoyed. The way in question, was a way used and enjoyed with a part of the demised premises. It therefore passed to the plaintiff by the very words of the lease. That being so, I think the verdict is right.

BEST, J. I am of the same opinion. In order to give effect to all the words of the lease, we must hold that a right of way, which at the time of the granting of the lease, was used with any part of the demised premises, passed to the plaintiff. This was a way always used with a part of the premises demised, and therefore passed to the plaintiff.

Rule refused.¹

* Bayley, J., had left the Court.

† If a man, seized of Blackacre and Whiteacre, uses a way through Whiteacre to Blackacre, afterwards grants Blackacre with all ways, this way through Whiteacre shall pass to the grantee. Comyns' Dig. tit. *Chemin*, D 3. So, if he be seized of two acres to which a way is appurtenant, he grants one acre with all ways, &c., the way shall be granted. See 6 Modern. p. 3; Cro. Jac. 121, 122, 170.

Lord SONDES *v.* FLETCHER.—p. 835.

A bond was conditioned for the resignation of a living, which the defendant when requested had refused to resign: *Held*, that he being a wrong doer, the jury were not bound, in assessing the damages, to confine themselves to the diminution of the value of the advowson to the plaintiff by the defendant's life-interest, nor in estimating the annual proceeds to deduct the curate's stipend.

DEBT on a bond, the condition of which was, for the resignation of the rectory of Kettering, (to which the defendant had been presented by the plaintiff,) when either of two persons therein named should be capable of taking the same. Breach, that the defendant, although requested, refused to resign. At the trial before ABBOTT, C. J., at the Middlesex sittings after Easter term, it appeared that the defendant was called upon to resign the living, in October, 1820, and that he refused so to do. The net annual value of the living was 700*l.*, and it was proved at the trial, that the defendant's life-interest, he being 46 years of age, was worth 10 years' purchase. It also appeared, that the life-interest of one of the persons named in the bond, whom the plaintiff intended to present, was worth 14 years' purchase. The jury found a verdict for the latter amount. The Solicitor-General moved for a new trial, on two grounds: 1st, That the true measure of the damages is the amount by which the plaintiff is prejudiced in the value of the advowson. Now, that is the value of the defendant's life-interest, and in that case the jury have formed the wrong estimate. Besides, in estimating the annual value of the living, it is not sufficient merely to take the gross receipts, for this species of property is subject, and ought to be estimated as subject to the performance of duty, and the defendant ought to have been allowed to deduct the curate's stipend.

Scarlett, for the plaintiff, now repeated an offer which he had made at the trial, viz.: that the plaintiff would give up all claim to the damages, if the defendant would resign the living.

Per Curiam. We are not prepared to say that the jury in this case have formed a wrong estimate of the damages, for the defendant having entered into a bond to do a particular thing which he has refused to do, is a wrong doer, and he is not to be permitted to estimate the value of the living as if he were the purchaser of it. Besides, it appeared at the trial, that the defendant had it in his power to relieve himself from this verdict by resigning the living; and if he does not do that, it is clear that he considers the damages found by the jury as less than the value of the living to him.

Rule refused.

JONES v. BIRD and Others.—p. 837.

By a local act relating to the commissioners of sewers for Westminster, it was provided that no plaintiff should recover in any action brought for any thing done in pursuance of the general acts for sewers, or that act, unless notice in writing was given to the defendants specifying the cause of such action. A notice stated that the defendants, who were contractors under the commissioners, made, altered, &c. certain sewers, &c. running under, through, or adjoining, or near to the plaintiff's house, in so negligent, incautious, unskilful, improvident, and improper a manner, that it fell down; and by the declaration and proof given, it appeared that the sewer did not run close to the plaintiff's house, but close to five other houses adjoining thereto, and that the house was damaged, and fell in consequence of the fall of a stack of chimneys of one of those houses, which had been built on the arch of the sewer, and which had been insufficiently shored up by the defendants during the continuance of the work: *Held*, that this notice sufficiently described the cause of action: *Held*, also, that commissioners of sewers, and persons working by their order, in the course of the necessary repair of a sewer in the neighbourhood of houses, are bound to take all such proper precautions for securing them, and to shore them up if necessary, as skilful persons would do, and that they were bound, under the above circumstances, to give specific notice to the owner of the house to which the stack of chimneys belonged, of their construction, and of the danger arising therefrom, and that a general notice to him to take proper means to secure his house was not sufficient.

CASE by the plaintiff, as the owner of the reversion, against the defendants who were employed under the commissioners of sewers for damage done to a house in the parish of St. Clement, Danes, in the county of Middlesex. The first count of the declaration averred, that the defendants made, altered, repaired, cut, dug, worked, and enlarged, certain sewers, gutters, and ditches, being and running near unto the said house in which plaintiff was interested, and also near to five other messuages, &c., near to the plaintiff's house, but nearer to the said sewers, &c. (and which five messuages were built close to each other, and one of them adjoining to the plaintiff's house), in so negligent, incautious, unskilful, improvident, and improper a manner, that, by means thereof, the said five messuages were thereby undermined, and the walls gave way and fell down, and by means thereof, the walls of the plaintiff's house were damaged and fell down, &c. The second count stated, that the defendants wrongfully and unlawfully altered and changed the ancient courses and direction of certain ancient sewers, &c., and then alleged the damages as in the first count. The third count stated, that the defendants were employed by certain persons acting as commissioners of sewers, to repair certain common sewers near to the plaintiff's house, and the other five messuages; and that they so carelessly, negligently, unskilfully, and improperly conducted themselves, in making, cutting, digging, enlarging, deepening, and repairing the sewers, that the foundation of the five messuages was weakened, and thereby part of them fell down, and the plaintiff's house was injured. The fourth count stated, that the defendants being so employed, &c., cut, sunk, dug, &c., divers sewers, &c., so near to the foundation of the five messuages, as to endanger the same unless they were properly shored up and supported; which defendants neglected to do, and that thereby the damage happened. The defendants pleaded first, the general issue; and secondly, a justification, that

the several acts in the declaration mentioned, were done under a commission of sewers of the late king, according to the tenor, purport, and effect of the 23 Hen. 8, c. 5; thirdly, a similar justification under 3 Jac. 1, c. 14; fourthly, under 47 G. 3, c. 7; fifthly, under 23 Hen. 8, and 47 G. 3, c. 7, together; and sixthly, under the 23 Hen. 8, and the several other statutes relative to sewers. Replication, *de injuria, &c.*, and issue thereon. At the trial at the Middlesex sittings after Michaelmas term, 1821, before ABBOTT, C. J., the plaintiff, pursuant to the local statute 52 G. 3, c. 48, proved a notice to the defendants signed by his attorney, stating that the action was brought, "for that the defendants did by themselves, their servants or workmen, make, alter, cut, dig, work, and enlarge certain sewers, gutters, ditches, and works then being, and running, under, through, or adjoining, or near unto a certain messuage or tenement, shop and premises of the plaintiff, situate and being, &c., in the tenure or occupation of E. H., his tenant, in so negligent, incautious, unskilful, improvident, and improper a manner, that the said messuage or tenement, shop, and premises, or the greater part thereof, fell and were greatly damaged, weakened, and destroyed, and rendered unfit and dangerous for use and habitation." It further appeared by the evidence, that the sewer, which it was necessary to repair, passed close to five houses adjoining that belonging to the plaintiff, and that a stack of chimneys belonging to one of those houses was built upon the arch of the sewer. In the execution of the work it became necessary to rebuild this arch, and in order to support the chimneys in the meantime, a transum and two upright posts were placed under them in order to support them, but without success. The chimneys fell, and in consequence of their fall, the adjoining houses, including the plaintiff's house, fell also. There was contradictory evidence as to the facts, whether in case there had been raking shores placed externally to support the chimneys in addition to the support below them, the accident would have been prevented. The plaintiff's witnesses were of opinion that it would, and those for the defendants, that it would not have been of any use, and that it was impossible to have prevented the fall of the chimneys. There was no specific notice given to the owner of the house to which the chimneys belonged, of their dangerous state, or that it would be necessary for him to take them down. But there was a general notice to the inhabitants to secure their houses whilst the sewer was repairing. It also appeared, that there had been a dispute as to the liability to shore up the houses. The defendants and the commissioners of sewers contending, that it was the duty of the owners of the houses to secure themselves, by so doing, and that they were not bound to do it for them. The jury, under the directions of the Lord Chief Justice, were of opinion that the defendants had conducted themselves negligently in doing the work, and accordingly found a verdict for the plaintiff. *Scarlett* in last Hilary term obtained a rule nisi for entering a nonsuit, or for a new trial. The former, on the ground that the notice was not sufficient, inasmuch as the injury there stated was one arising immediately to the plaintiff's house from the acts of the defendants;

whereas, in the declaration, and by the evidence, it appeared that the injury really complained of, arose from the conduct of the defendants, in not sufficiently shoring up and supporting some other houses, which, by their fall, had damaged that of the plaintiff. This, therefore, was not an immediate but a remote injury. As to the new trial, he contended that the verdict was against the evidence, and that the real question was, whether the defendants had acted bona fide, and according to the best of their judgment at the time, and not whether after the event had occurred, other persons might think that shoring up or other precautions might possibly have prevented the accident, and that they were not bound to give a specific notice of the danger of the chimneys to the owner of the house.

The Solicitor-General, Gurney, Curwood, and Comyn, showed cause. The notice is quite sufficient. All that is required by the act is, that notice in writing shall be given to the defendants twenty-eight days before the action is commenced of such intended action, signed by the attorney for the plaintiff, specifying the cause of such action; and the section further provides, that the plaintiff shall not recover, if sufficient amends shall have been tendered. The object, therefore, was not to give an accurate and minute description of the cause of action as required in a declaration, but only a substantial notice of the ground of complaint to enable a party to tender amends. Here it states, that defendants worked the sewer in so negligent, incautious, unskilful, and improvident a manner, that the plaintiff's messuage, or the greater part thereof, fell, and was greatly weakened, damaged, and destroyed. The sewer was the primary support of the plaintiff's house, and the adjoining ones also: and the fall is in fact the immediate consequence of the defendants' negligence. There is no other intervening cause of the accident. The whole fell together in consequence of the defendants' act. That act is, therefore, the immediate cause of the accident to each of the houses. As to the other point: this was a case for the jury, and the weight of evidence is in favour of the verdict. Here it was clearly the duty of the commissioners to have shored up the houses whilst the work was going on. And the evidence is strong to show, that if that had been done, no accident would have happened. It is now said that it would have been useless. But originally the question was not, whether it was useless, but, whether the commissioners were liable to do it. There is good reason why they should be liable; for they may go into the adjoining houses, if necessary, for the purpose. But private individuals cannot do so. And they may defray the expense of doing it out of the rates. *Case of the level of Hull*, 2 Str. 1127.

Scarlett, Marryat, Littledale, and Andrews, contra. The question is not what a person well acquainted with the facts would conclude, from the words of this notice, but what a person wholly unacquainted with them would infer. Such a person would never have supposed, when he read this notice, that the accident had really happened in consequence of a stack of chimneys having fallen at some little distance, and thereby occasioned the fall of the plaintiff's house. He would

certainly have concluded that the sewer had run immediately under the plaintiff's house, and that the accident had occurred from a want of due support to it. If a remote cause may thus be given in evidence, under such a notice, where is it to stop? Suppose, many streets off, some accident happens, and produces, remotely, a damage to the plaintiff's house, would that be sufficiently described by such a notice as this? These notices are for the protection of public officers in the discharge of their duty, and should be strictly construed. Here the notice states, that by the defendants' negligent act, the plaintiff's house was weakened. But that was not so. Another person's house having been improperly built, the chimneys fell, and by their fall the injury happened. Here, therefore, an injury really consequential is stated in the notice as immediate. The notice, therefore, would tend to mislead the defendants. The way of trying the question is, to suppose the declaration drawn so as contain only one count, stating what is here stated in the notice. It is clear that then the plaintiff would have been nonsuited, on the ground of a variance. Here, therefore, there is a variance between the notice and the proof. If the notice had stated that the injury occurred from want of shoring up the houses, the defendants might have tendered amends. As to the other question, it may be admitted, that as to the necessity for shoring up the houses there is contradictory evidence. But the proper question is, whether the defendants acted for the best, and bona fide with their best skill. If they did, and there is no contradiction as to that, they are not responsible. It is too much to make them liable because, after the accident has happened, some persons may be found to give their opinion that a different course might possibly have prevented the accident. The whole arose from the improper construction of the stack of chimneys which rested on the arch of the sewer. And, if nothing had been done by the defendants, the houses would have equally fallen in a short time, from the decay of the sewer. The owner of the house must have known of the construction of the chimneys, and the defendants were not bound to give a specific notice of it. They had given a general notice to all the inhabitants to secure their houses while the sewer was repairing, and that was sufficient. Here the defendants were acting bona fide in the exercise of a public duty, imposed by law; and *Sutton v. Clarke*, 6 Taunt. 29, is an authority to show, that in such a case an action is not maintainable against them.

ABBOTT, C. J. I am glad that this matter has been so fully discussed; but I am still of the opinion which I entertained at the trial. I think the notice is sufficient, and that it ought not to be construed with great strictness, its object being merely to inform the defendants substantially of the ground of the complaint, but not of the mode or manner in which the injury has been sustained. That may be, either by their having done an act injurious to the plaintiff, or, as in the present case, by omitting to do an act improper and necessary to be done. It is said that this notice is only applicable to the case of damage arising immediately from the act of the defendants; but I think it is not material or necessary to specify whether the injury be direct or remote.

As to the merits, I left it generally to the jury to say, whether there was a want of due care and diligence on the part of the defendants. One question, arising at the trial, was as to the effect which shoring up would have produced, and I stated that the commissioners of sewers and their agents, when repairing sewers in the neighbourhood of houses, were bound to take all proper precaution for their security; and that one question for the jury to consider was, whether shoring up was a proper precaution, and whether it had been omitted. I also told them, that, even if they were of opinion that the stack of chimneys could not by any shoring up whatsoever have been prevented from falling, still it was the duty of the defendants, if they thought so, to give specific notice of the danger to the owner; and that, if they did not do so, they were responsible. Here no such specific notice of the peculiar construction of the stack of chimneys, and of the danger arising from it, was given. On either of these grounds, therefore, the verdict of the jury is sustainable.

BAYLEY, J. I am of the same opinion; I think the notice was sufficient, and that the case was properly left to the jury, who have come to a right conclusion. A notice of this sort does not require the same precision as a declaration. It is quite sufficient if it calls the attention of the defendants to the general nature of the injury, so that they may go to the premises, and see what the ground of complaint is. If it were otherwise, it would be necessary, in many cases, to have a notice with several counts in it. Here the notice, in substance, states, that the defendants so negligently and improperly worked the sewer, that the plaintiff's house was thereby weakened and gave way. Now the facts are, that the defendants worked under a stack of chimneys, without either properly securing them, or giving notice of their danger to the owner, in order that he might take them down; this was improperly and negligently working the sewer; for if a party does an act which is improper, unless certain previous precautions are taken, he may fairly be said to do that act improperly. But it is said, further, that the notice is incorrect, inasmuch as the act done by the defendant did not produce an immediate effect upon the plaintiff's house. But I think, that as the defendant did work without sufficiently supporting the chimneys, which by their fall damaged the plaintiff's house, he may fairly be said to have, by his act, damaged the plaintiff's house. This notice, therefore, is sufficient. As to the merits of the case, it is contended, that the defendants are protected, if they acted bona fide and to the best of their skill and judgment. But that is not enough; they are bound to conduct themselves in a skilful manner; and the question was most properly left to the jury to say, whether the defendants had done all that any skilful person could reasonably be required to do in such a case. The jury were of opinion that they had not, and I think they had abundant grounds for their verdict.

BEST, J.* The only object of the notice is, to give the defendants an opportunity to tender amends, and it ought not to be scanned very

* Holroyd, J., was absent at Chambers.

nicely. Its object is at an end the moment the action is brought, and it is only necessary to refer to it, in order to see whether, substantially, the defendant has been informed of the ground of the complaint. It is no ground of nonsuit that there is a variance between the notice and the proof. As to the merits, the question is, whether the defendants had, in working the sewer, conducted themselves with proper skill and care; and the jury thought they had not. In *Sutton v. Clarke* the judgment proceeded, on the ground that there was no pretence for imputing negligence to the defendants. Here the jury have distinctly found the contrary; and here, too, the action is brought against the parties who negligently executed, and not against the party giving the order, as in that case. As to the utility of shoring up, it appears that the commissioners of sewers did not originally contend that it was of no use, but that they were not bound to do it. That, however, was a question for the jury, which was properly left to them, and I think that their verdict was right.

Rule discharged.

WILTON v. GIRDLESTONE.—p. 847.

A bill against an attorney was filed of Michaelmas term, and appeared by the memorandum to have been filed on the 28th November: *Held*, that evidence was admissible to show that it was actually filed on the 24th December: *Held*, also, that a demand and refusal is evidence of a prior conversion, and therefore, where deeds were in defendant's possession prior to Michaelmas term, and the demand and refusal proved were on the day after that term, it was held that this was evidence of a conversion before the term.

TROVER for certain deeds. Plea, general issue. At the trial, at the Middlesex sittings after Easter term, before ABBOTT, C. J., it appeared that the bill which was against defendant as attorney was entitled generally to of Michaelmas term, but the memorandum showed that the bill was filed on the 28th November. It was proved, however, that the bill was actually filed on the 24th December. This evidence was objected to, on the ground that it contradicted the record; but the Lord Chief Justice overruled the objection. The deeds in question were proved to have been placed in the defendant's hand before Michaelmas term. But the only evidence of a conversion was a demand and refusal on the 29th November last. The jury having found a verdict for the plaintiff,

Abraham, by leave, moved to enter a nonsuit, on the ground that the evidence ought not to have been received, as it contradicted the record.

Per Curiam. *Morris v. Pugh*, 3 Burr. 1241, is an authority to show that this objection cannot be sustained. A demand and refusal is evidence of a prior conversion; and as the deeds were in the defendant's hands prior to Michaelmas term, there was evidence for the jury of a conversion before that period, and they have found the fact to be so.

Rule refused.

JACKSON v. YABSLEY.—p. 848.

Where an action for breach of covenant was pending, and, with all matters in difference, was referred to arbitration, the cost of the suit to abide the event: *Held*, that an award that the plaintiff had no demand on the defendant on account of any alleged breaches of covenant, or on any other account whatsoever, was final, although the suit was not, in terms, put an end to.

IN this case the plaintiff had commenced an action to recover damages for breaches of covenant, under a lease. The parties were landlord and tenant. The case was referred by agreement, dated 9th March, last, to three arbitrators. The award was made by two of them, and dated April the 9th, 1822, and after reciting that differences were existing between the parties, and an action at law pending, and that the suit and all matters in difference had been referred to them, and that the costs of suit, &c. were to abide the event of the award, they awarded that the plaintiff had no claim or demand on the defendant, on account of any alleged breaches of covenant, or otherwise, on any account whatsoever, to the day of the date of the award, and that the defendant had no claim on the plaintiff, in respect of improvements to the estate, or otherwise; a rule nisi having been obtained to set aside the award, on the ground that it was not final,

Russell showed cause. This is a final award. It is true, that the arbitrators have not, in terms, put an end to the action of covenant; but they have in substance, and that is sufficient. He cited *Hawkins v. Colclough*, 1 Burr. 271, Tidd's Practice, p. 873, Anonymous, Smith's Rep. 426.

Adam, contra, contended, that it was incumbent on the party to put a distinct end to the suit. Here the costs depend on the event of it; and how are they to be taxed?

Per Curiam. We are of opinion that the award is final. It is sufficient, if looking at the whole award, it appears that the matter is determined; and that is the case here.

Rule discharged.

GOODTITLE, on the Demise of the Duke of Norfolk, v.
NOTITLE.—p. 849.

The notice to the tenant in possession at the foot of the declaration in ejectment, need not be in the name of the plaintiff: but, if in the name of the lessor of the plaintiff, or even any other person, the Court will permit the rule for judgment against the casual ejector to be drawn up.

Reader applied for leave to enter up judgment against the casual ejector. The notice to the tenant in possession at the foot of the declaration in ejectment, was in the name of, and signed by the lessor of the plaintiff. He referred to the 1 G. 4, c. 87, s. 1, by which the landlord, in order to bring the case within that act, is required to address the notice at the foot of the declaration to the tenant in possession.

The Court held, that the notice was quite regular; adding, that even if it were signed by a wrong name, the rule might be drawn up.

Rule absolute

RICHARD POWIS and WILLIAM POWIS *v.* SMITH.—p. 850.

Where premises had been demised by two tenants in common, and the rent for a time paid to the agent of both, but afterwards the tenant had notice to pay a moiety of the rent to each of the two, and the rent was so paid accordingly, and separate receipts given: *Held*, that it then became a question of fact for a jury to say, whether it was the intention of the parties to enter into a new contract of demise, with a separate reservation of rent to each.

ACTION for the use and occupation. Plea, non assumpsit. At the trial, before ABBOTT, C. J., at the sittings after last Hilary term, it appeared that the premises in question were, in May, 1810, demised by both the plaintiffs and the defendant. In 1817 the defendant received notice from the plaintiffs to pay the moiety of the rent to each of them, and from that time the rent was so paid, and separate receipts given. The present action was brought to recover the rent that accrued due from the 25th December, 1819, to the 24th June, 1821. The Lord Chief Justice thought, upon this evidence, that separate actions ought to have been brought by each of the plaintiffs for his moiety of the rent which accrued subsequently to the alteration in the mode of paying rent, and he nonsuited the plaintiffs. A rule nisi having been obtained for a new trial,

Marryat now showed cause. There can be no doubt, that if tenants in common join in demising, they may join in receiving the rent. Here, however, they made their election to have a severance of the rent, and each made a demand of his separate moiety; and from that time each must be considered to have made a separate demise of his separate moiety. And if that be so, each must bring a separate action.

Gurney, contra. If separate actions had been brought it would operate as a great hardship on the defendant, for he would then have to pay the costs of two actions instead of one. The original contract of demise was with two; and there has been no new contract. In the case of *Martin v. Cromp*, 1 *Ld. Raym.* 340, it is laid down, that if there be two tenants in common of a reversion, expectant on a lease for years, upon which a rent is reserved, they may either join in debt, for the rent, or sever; and *Midgley v. Lovelace*, *Carthew*. 289, is an authority to show that they may also join in covenant; and in *Littleton*, s. 315, it is laid down, that tenants in common may maintain personal actions jointly; and in s. 316, that if two tenants in common make a lease, rendering to them a rent, the tenants in common shall have an action against the lessee, and not different actions, because the action is in the personalty. The action for use and occupation is substituted in place of the action of debt, and, consequently, the plaintiffs were entitled to bring a joint action, unless the jury found as a fact, that

there was a separate demise by each. He also cited Co. Litt. 218, and *Harrison v. Barnsby*, 5 Term Rep. 246.

ABBOTT, C. J. It is clear, that if there be a joint lease by two tenants in common, reserving an entire rent, the two may join in action brought to recover the same; but if there be a separate reservation to each, then there must be separate actions. Here, by the original contract, there was a letting of the whole premises, by the two tenants in common, at an entire rent; afterwards the rent was severed. It became a question of fact, upon the whole evidence, whether the parties thereby meant to enter into a new contract, with a separate reservation of rent to each, or whether they meant to continue the old reservation of rent, each of the plaintiffs receiving his own moiety. I think that question ought to have been left to the jury. The rule, therefore, for a new trial ought to be made absolute.

BAYLEY, J. This was a question for the jury, whether there was a new contract, or only an alteration in the mode of receiving the rent. I should have summed up to the jury, strongly, that it was the latter.

HOLROYD, J. The evidence does not seem to me to show that the contract which was originally joint, was severed by the agreement between the parties. Unless the jury found that fact, the verdict cannot be supported.

BEST, J., concurred.

Rule absolute.

SOUTTEN v. SOUTTEN.—p. 852.

Where a surety, in a warrant of attorney, in order to discharge himself from the personal liability, paid part of the debt due to the creditor of a bankrupt, who had proved under the commission, and thereupon satisfaction was entered on the record: *Held*, that this did not fall within 49 G. 3, c. 121, s. 8, as being a payment of part of a debt in discharge of the whole, and that consequently the bankrupt's certificate was no bar to an action by the surety to recover the money so paid by him.

ASSUMPSIT for money paid, &c. Plea, general issue. The action was commenced in Hilary vacation, 1821, and issue was joined in Trinity term following, and the cause set down for the second sittings in that term. The notice of trial having been countermanded, the cause was again set down for trial at the first sittings in Michaelmas term, and was ultimately made a remanet to the adjourned sittings after that term. On the 17th July, 1821, the defendant obtained his certificate, under a commission of bankruptcy, dated March 9th, 1818. It appeared that the action was brought to recover the sum of 500*l.*, paid by the plaintiff for the defendant, as surety to one Richard Bodfield, in a warrant of attorney, dated 3d April, 1816, for payment of 1970*l.* and interest, by instalments, with a stipulation, that, in case of any one default, the whole should be immediately payable, and execution should issue thereon for the whole. Judgment was signed on this warrant of attorney, April 5th, 1816. At the time when the commission issued, there remained due on the warrant of attorney 1837*l.* 15*s.*; and shortly after, another instalment becoming due, default was made

On the 14th of March, 1818, Bodfield proved the debt under the commission: and on the 25th of March, 1818, the plaintiff and Bodfield agreed that the former should pay 500*l.* in discharge of his personal liability as surety, which was done, and satisfaction was entered on the record as of Michaelmas term, 1818. The roll of the judgment was, however, only carried in and satisfaction entered on the record subsequently to the sittings after last Michaelmas term, and shortly before the adjourned sittings, when the cause was tried. At the trial, after the office copy of the judgment roll had been given in evidence, a plea of the defendant's certificate puis darrein continuance was offered by the *Solicitor-General*. The Lord Chief Justice was of opinion, that as the whole of Michaelmas term had elapsed, during which the defendant might have pleaded it in banc, he was now too late, and refused to receive the plea. The plaintiff accordingly had a verdict. The *Solicitor-General*, in last Hilary term, obtained a rule nisi for a new trial, with liberty for the defendant to plead his certificate puis darrein continuance nunc pro tunc as of Michaelmas term.

Marryat and *Espinasse* showed cause. Here the defendant was too late; for he obtained the certificate in the vacation after Trinity term; and therefore he might, at any time during the whole of Michaelmas term, have put in this plea. Besides, the plea, if put in, cannot avail the defendant; for this payment does not fall within 49 G. 3, c. 121, s. 8, not being a payment of the debt, nor of a part in discharge of the whole debt. Here the plaintiff, by this payment, could not prove himself, or have the benefit of the creditor's proof, under the commission. The case, therefore, is not within the act of parliament.

The Solicitor-General and *Chitty*, contra. Here the defendant could not have pleaded his certificate in bar during Michaelmas term; for at that time satisfaction was not entered on the roll. The roll was carried in after the term, and then the situation of the defendant was altered. For by the entry of satisfaction on the record, the sum became a payment of part of the debt in discharge of the whole, and then it falls within 49 G. 3, c. 121, s. 8.

Per Curiam. If we are to give the defendant leave to plead his certificate puis darrein continuance, we ought, at least, to be satisfied that, when pleaded, it will be a bar to the action. But we are of opinion that it would not be so. The 49 G. 3, c. 121, s. 8, only applies to cases where a surety has paid the whole debt, or a part in discharge of the whole. In those cases, the creditor has no further claim under the commission, and the surety is then placed in the creditor's original situation with respect to the bankrupt. Here that is not the case. The original creditor has proved under the commission, and the present plaintiff has released himself by this payment from his personal liability as surety. Here, therefore, he cannot derive any benefit under the commission; and the legislature could never have intended, under such circumstances, to take away the right of action which he previously possessed.

Rule discharged.

CARTER and Another v. TOUSSAINT.—p. 855.

A horse was sold by verbal contract, but no time was fixed for the payment of the price. The horse was to remain with the vendors for 20 days without any charge to the vendee. At the expiration of that time the horse was sent to grass, by the direction of the vendee, and by his desire entered as the horse of one of the vendors: *Held*, that there was no acceptance of the horse by the vendee within 29 Cor. 2, c. 4, s. 17.

ASSUMPSIT for the price of a horse, with the usual money counts. Plea, general issue. At the trial, at the Middlesex sittings after last Hilary term, before ABBOTT, C. J., it appeared that the plaintiffs, who were farriers, sold to the defendant a race-horse, by a verbal contract, for 30*l*. The horse, at the time of the sale, required to be fired, which was done with the approbation of the defendant and in his presence; and it was agreed that the horse should be kept by the plaintiffs for twenty days, without any charge being made for it. At the expiration of the twenty days the horse was, by the defendant's directions, taken by a servant of the plaintiffs' to Kimpton Park, for the purpose of being turned out to grass there. It was there entered in the name of one of the plaintiffs, which was also done by the directions of the defendant, who was anxious that it might not be known that he kept a race-horse. No time was specified in the bargain for the payment of the price. The defendant afterwards refused to take the horse. The jury, under the direction of the Lord Chief Justice, found a verdict for the plaintiffs. *Scarlett*, in last Easter term, obtained a rule nisi for entering a nonsuit, on the ground reserved at the trial, that there was not a sufficient acceptance by the defendant to take the case out of the 17th section of the statute of frauds.

Marryat and *Hawkins* showed cause. The case is not within the 17th section of the statute of frauds; for here there was a complete delivery, and acceptance by the defendant. If a buyer orders goods to be sent to a particular wharf, and they are there delivered, the acceptance by the wharfinger is clearly sufficient to take the case out of the statute. Here, by the defendant's order, the horse was sent to Kimpton Park. And this is, therefore, a stronger case of acceptance than *Elmore v. Stone*, 1 Taunt. 458, where the removal was from one stable to another. *Hanson v. Armitage*, ante, 557, will be cited on the other side. There, however, there was no special direction as to the place where the goods were to be sent. Besides, that case is at variance with *Hart v. Sattley*, 3 Camp. 528, where CHAMBRE, J., held, that the master of the ship must be considered as the vendee's agent to receive the goods, in a case where they were shipped according to the usual course of dealing between the parties. But it is said that the horse was entered at Kimpton Park in the name of one of the plaintiffs. That, however, being done by the request of the defendant, can make no difference. It is admitted, that if there be an acceptance, though but for a minute, it is sufficient. Here, the delivery of the horse to the person who conveyed him from the plaintiff's house to the park, was sufficient; for that person must be considered as the defend-

ant's servant. Besides, the horse was fired for the use of the defendant, and must be considered as having remained in the hands of the plaintiffs for the purpose of cure; and then the case falls precisely within the principle of *Elmore v. Stone*.

Scarlett and Lawes, contra. If this question were now for the first time to be determined, no doubt could be entertained by any one who looked at the words of the statute. It is not requisite indeed, that to constitute an acceptance, the goods should be in the manual possession of the vendee. But he must at least have the complete control before he can be considered as having accepted them. If the key of the warehouse where they are deposited is delivered to him, or an order for delivery to him is signed in the wharfinger's books, in these and the like instances it may fairly amount, if he assents, to an acceptance on his part. For there, he on the one hand has the complete control without any lien on the part of the vendors; and on the other hand, he cannot after that be allowed to object to their quality, &c. But if that criterion be applied to this case, it will determine it in favour of the defendant. For here, he had no control over the horse. He could not have compelled the park keeper to have delivered it to him. Here too, there was no time fixed for the payment of the price, and therefore, the vendors would not have been bound to part with the horse till the price was paid. This, therefore, falls within the cases of *Hanson v. Armistage*, ante, 557, and *Tempest v. Fitzgerald*, 3 B. & A. 680. *Elmore v. Stone* is a case of doubtful authority, but at all events, it is not precisely in point with this. There, the Court considered the vendor as having by his own act become the agent of the vendee, and having thereby lost his lien for the price of the horse. But here the party has not lost that lien. Suppose Carter had become bankrupt, it is clear that the horse would have gone to his assignees, as being in his possession at the time of the bankruptcy. That consequence would not have followed in *Elmore v. Stone*. Suppose the horse had been damaged in going to the park, could not the defendant have objected to receive him? If he could, then according to the principle laid down in *Howe v. Palmer*, 3 B. & A. 321, there is no sufficient acceptance. As to the firing, it was not done specially for the defendant, but generally for any one to whom the horse might afterwards be sold. This case, therefore, falls within the statute of frauds, and the defendant is entitled to the judgment of the Court.

ABBOTT, C. J. In this case, it appears there was a verbal bargain for the horse at 30*l.*, for the payment of which no time was fixed. The seller, therefore, was not compellable to deliver it until the price was paid. In *Elmore v. Stone*, there was a contract of a similar description, but the Court thought that the circumstance of the change of the stable altered the character in which the plaintiff there held possession of the horse. For, the plaintiff thereby consenting to have the horse placed in the livery stable, ceased to keep possession as owner, and held it only in his capacity of livery-stable keeper. There is no circumstance of that description in the present case. It is quite clear, that the present plaintiffs kept possession of the horse as owners until it was

sent to Kimpton Park. If, indeed, it had been sent there and entered in the defendant's name by his directions, I should have thought it would have amounted to an acceptance by him. But here it was entered in the plaintiffs' name, and the plaintiffs' character of owner remained unchanged from first to last, and they could not have been compelled to deliver it without the payment of the money. There was then no sufficient acceptance to take the case out of the statute of frauds; and consequently the action is not maintainable.

BAYLEY, J. The statute of frauds is a remedial law, and we ought not to endeavour to strain the words in order to take a particular case out of the statute. By the 17th section it is provided, that in the case of a sale of goods above the value of 10*l.*, the buyer must accept, and actually receive part of the goods so sold. There can be no acceptance or actual receipt by the buyer, unless there be a change of possession, and unless the seller divests himself of the possession of the goods, though but for a moment, the property remains in him. Here, the plaintiffs had a lien on the horse, and were not compellable to part with the possession till the price was paid. Then the question is, was there any thing to deprive them of that right? It is said that the horse was fired, but after that he still remained in their possession; then he was sent under the care of their servant to Kimpton Park. But that was no act of delivery to dispossess them of the horse. At Kimpton Park, he was entered in the name of one of the plaintiffs, and they still therefore retained a control over him. How can it be said that the horse was in the possession of the defendant, when he had no right to compel a delivery to him. For he could not, on tendering the keep, maintain trover against the park-keeper, because the possession had not passed from the vendors to him. The case of *Elmore v. Stone* is distinguishable. There the original owner of the horse had stables in which he kept horses as owner, and others, where he kept them as livery-stable keeper; and the Court considered, that by changing the horse from the one to the other, he had divested himself of the possession and given up his lien. But there is no circumstance of that sort here.

HOLROYD, J. I am of the same opinion. The facts here stated do not amount to an acceptance or actual receipt of the horse, which must be considered as having continued throughout in the plaintiffs' possession. The case would be different if the horse had been entered at the park in the name of the defendant; but being entered in the name of one of the plaintiffs, they retained a control over it, and the park keeper was their agent. This case is distinguishable from *Elmore v. Stone*; there there was a change of possession, but here there is not
Rule absolute.

**EASUM and Others, Assignees of DOWSLAND and Another,
Bankrupts, v. CATO.—p. 861.**

Where J. S. being desirous of making a shipment for his own risk and advantage, but not in his own name, represented to the merchants, through whom the shipment was to be made, that the goods were the property of A., and shipped on his account, and A. accordingly, by the desire of J. S., wrote to those merchants, stating the party to be so, and directing them to insure, and to advance money to J. S. on the goods, which was done: *Held*, that this was a credit given to A. by J. S. by the delivery of goods in its nature likely to terminate in a debt, and that, therefore, J. S. having subsequently become bankrupt, A. was entitled to recover the proceeds of the shipment from the merchants, and to set off against them a debt due from the bankrupt to him, it being a case of mutual credit within 5 G. 2 c. 30, s. 28.

ASSUMPSIT for money had and received, and the usual money counts. Plea, general issue. At the trial, at the Guildhall sittings after last Hilary term, before ABBOTT, C. J., a verdict, under the directions of the Lord Chief Justice, was found for the defendant. The following were the facts of the case: Dowsland and Davison, the bankrupts, were ship and insurance brokers in London, and the defendant, Cato, was a clerk in a bank at Lichfield. In December, 1818, the bankrupts, who were then indebted to the defendant in a large amount, were desirous to make shipments of goods on their own account and risk, to Rio de Janeiro. They accordingly purchased goods to the amount of 8000*l.*, in their own names, but with a view of shipping the same through the house of Messrs. I. and W. March, in the name of the defendant. It appeared, from a letter dated 17th December, 1818, from the bankrupts to the defendant, and his answer thereto, that the shipment was on the account and risk, solely, of the bankrupts, and that the defendant had no interest in it. The bankrupts, however, represented to Messrs. I. and W. March, that the goods belonged to, and were shipped on the account of the defendant. The goods were accordingly shipped, and the defendant, by the desire of the bankrupts, copied and sent a letter to Messrs. I. and W. March, dated 1st January, 1819, as follows: "Gentlemen, I have shipped on board the *Friendship*, Captain Dawson, for Rio de Janeiro, about ten tons of wrought copper, consigned to your house there for sale, the invoice cost of which will be about 2000*l.*, and I have to request you to advance to my friends, Messrs. Dowsland and Davison, on account of this shipment, 1000*l.*, or thereabouts, upon their handing you bills of lading. I have further to request, that you will insure 2000*l.* on these goods for my account, and with respect to the disposal of them, Messrs. Dowsland and Davison will make the necessary communications on the subject, previous to the departure of the ship." Messrs. I. and W. March accordingly advanced to the extent of 800*l.*, and such advance was made by them on the credit of the shipment made through their house. At the time the defendant copied and sent the letter, he did not know from whom the bankrupts had purchased the goods. The bills of lading stated that the goods were shipped by I. and W. March and Co. for Rio de Janeiro, and to be delivered to March, Brothers, and Co., or to their assigns.

freight for the said goods to be paid in London, with prime and average accustomed. The invoices were furnished by Dowsland and Davison, and signed by them; they were headed thus: "Invoice of 35 cases, &c., shipped on board the *Friendship*, William Dawson master, and consigned to Messrs. March, Brothers, there, for sale on our account and risk, as agents." The insurance on the goods, &c., shipped, was effected by Messrs. I. and W. March, in their own name. From the 1st January to the 14th June, 1819, the defendant, at the instance of Dowsland, made very considerable advances in cash and bills to Dowsland and Davison, making a balance due to the defendant, of 1196*l.* 10*s.* 1*d.* on the 14th of June. Dowsland and Davison became insolvent in July, 1819, and committed acts of bankruptcy about the 19th of March, 1820, and a commission issued against them, dated the 19th May, 1820, under which the plaintiffs were chosen assignees. After their insolvency, the house of March, Brothers, and Co., of Rio Janeiro, forwarded to the house of I. and W. March and Co., London, the accounts sales of the copper consigned to them, with three letters addressed to the defendant, dated 27th September, 1819, and 19th April and 6th May, 1820. This was the only correspondence which the defendant had with them, but it is not usual for persons making consignments through London houses, to correspond with the houses abroad, who know only the house through which the consignments are made. On the 29th July, 1820, the assignees, through their solicitors, wrote letters to Messrs. I. and W. March and Co., claiming the property in question, and requiring them not to account to any person but themselves for the same. After the issuing of the commission of bankruptcy the returns for the shipment so made to the house of March, Brothers, amounting to 247*l.* 19*s.* 11*d.*, came home to the house of I. and W. March and Co., who, in December, 1820, paid to the defendant the sum of 10*l.* in part of such proceeds. This payment was made to the defendant before this action was brought, and after notice given of the bankruptcy, and of the claim made by the assignees. At the time of the bankruptcy Dowsland and Davison were indebted to the defendant in the sum of 3102*l.* 18*s.* 8*d.* for moneys paid and advanced by the defendant, and for liabilities which the defendant had entered into for them previously to their stopping payment. The jury found as a fact that the bankrupts intended to give the defendant a lien on the shipments for the money previously advanced by him.* *Marryat*, in last Easter term, obtained a rule nisi for a new trial, on the ground that this was a verdict against evidence, and as to that he relied on the letter of the 17th December, 1818, as decisive to show, that the only object the bankrupts had was to conceal their interest in the transaction, which was not a proper one for them, as brokers, to undertake. The Court, in granting the rule, directed the question to be argued, whether, independently of that finding, the verdict was not right, it being a case of mutual credit within 5 G. 2, c. 30, s. 28.

* There was another shipment through Messrs. Warra, Brothers, to which the action equally applied. But as the two were in all essential particulars exactly similar, we have thought that our report would be simplified by omitting the fact relative to that transaction.

Scarlett and *Campbell* showed cause. They contended, that, whether or not the special finding of the jury could be supported, this was clearly a case of mutual credit between the bankrupts and the defendant, within 5 G. 2, c. 30, s. 28, by which the commissioners are to settle the account between the parties, and the balance alone is to be claimed or paid. Here the bankrupts represented the defendant as the owner of the goods to the merchants through whom the consignment was to be made, and thereby gave him an authority, which being coupled with an interest was not countermandable by them, to receive the proceeds. It is quite clear that the defendant, if he had received these proceeds before the bankruptcy, could have set them off against the debt due from them to him. And what is the difference? Here it was a credit, given by the delivery of the goods, in its nature likely to terminate in a debt; and that is the criterion laid down by GIBBS, C. J., in *Rose v. Hart*, 2 Bay. M. 547. This case falls, therefore, within the principle laid down in *Olive v. Smith*, 5 Taunt. 56, and *French v. Fenn*, Cooke's B. L. 7th ed. 536.

Marryat, *Puller*, and *Maule*, contra, contended, that this was not within the statute. Here the bankrupts could have compelled the house of March and Co. to account for the proceeds to them. For the defendant was not at all interested in the gain or loss arising from the transaction. There is no instance to be cited in which it has been determined to be a case of mutual credit, unless where the goods have been delivered to and are in the possession of the party himself. That was the case in *Olive v. Smith* and *French v. Fenn*, which are, therefore, distinguishable from the present case. In *Sampson v. Burton*, 2 Brod. & B. 89, 4 B. Moore, 515, where they were in the hands of a third person, it was held not to be within the statute. As to the finding by the jury, there is clearly no evidence to support it.

ABBOTT, C. J. My opinion, in this case, is not founded upon the intention found by the jury, but on the ground that the facts here establish a case of mutual credit. It appears that the bankrupts, being desirous of making consignments to Rio de Janeiro, and not choosing to be known in the transaction, represented to I. and W. March, that the goods shipped by them belonged to the defendant, and were to be shipped on his account, and that they procured the defendant to write letters to I. and W. March, directing advances to be made upon the goods, which was accordingly done; and that house took upon themselves the management of the concern. In the invoice and bill of lading the goods were not described as the goods of the bankrupts. Now, if all the parties had continued solvent, it is clear that, according to the usual course of trade, the proceeds of these goods would not have been paid over to the bankrupts, but to the defendant. It seems to me, therefore, that this case is to be considered as if the bankrupts had actually put the goods into the hands of the defendant; and then, no doubt, it would have been a case of mutual credit within the statute 5 G. 2, c. 30, s. 28, and he would then have been entitled, in the event which has happened, to set off against the proceeds the debt due from the bankrupts to him. I think, therefore,

that the verdict is right, and that the defendant is entitled to our judgment.

BAYLEY, J. I am not sure whether any case in the books goes the full length of this; but, I think that this is a case of mutual credit within the statute 5 G. 2, c. 30, s. 28, which is now held to be confined to such credits as must in their nature terminate in debts. That, as it seems to me, is the case here. The bankrupts apply to the defendant to permit his name to be used in these consignments, and he writes letters, requesting advances to be made. Now this seems to me to amount to a consent by the bankrupts, that the defendant shall be considered by I. and W. March as the owner of the goods consigned. And one consequence resulting from that would be, that the defendant would have the right to require from I. and W. March, an account of the proceeds and the payment of the balance due. It amounts, therefore, to a consent by the bankrupts, that the money produced by the consignments should pass through the defendant's hands. In that case, he would have a right to deduct from it the debt due to him. And that might be the ground for his permitting the bankrupts to be, and to remain in his debt. It is said in argument, that the bankrupts could have compelled I. and W. March to account for the proceeds with them. But that is a *petitio principii*. For they could not do so, if the defendant had a right to receive and to stop the money in transitu; for such a right would be a beneficial interest in him, and the bankrupts could not, therefore, countermand his authority to receive the money. I think, therefore, that this was a case of mutual credit, likely to terminate ultimately in a pecuniary balance on the one side or the other. It is, therefore, within 5 G. 2, c. 20, s. 28, and the defendant is entitled to our judgment.

HOLROYD, J. I am of opinion that this is a case of mutual credit, and therefore, that independently of the intent found by the jury, the verdict is right. The case lies within a narrow compass. The defendant does not lend his name generally to the bankrupts, but only for a particular transaction. The goods were to be sent in the defendant's name by I. and W. March to Rio de Janeiro, and the proceeds were to be remitted to them as his agents. Under these circumstances, and knowing this, the defendant subsequently made advances to the bankrupts, which probably were made on the ground, that those proceeds were in the hands of persons who were accountable to him. It is true, that the defendant directed the bankrupts to be consulted as to the disposal of the goods, and if no bankruptcy had happened, they would have had the disposal of them. These directions, however, were revocable by the defendant. I am clearly of opinion, that the parties having agreed, that these goods should be represented as belonging to the defendant, and he having advanced money in consequence, it is a case of mutual credit within the statute.

BEST, J. I am of the same opinion. The goods in this case were, as it seems to me, as much under the defendant's control as if they had been sent to his warehouse. Messrs. I. and W. March must, from the facts stated, have considered him as the principal in the adventure.

All directions relative to it were in his name, and the bankrupts were represented throughout merely as his agents, and as having no powers except what they derived from him. The application was not for an advance to the bankrupts, but through the bankrupts to the defendant. That is a strong circumstance to show that the property was not to be dealt with without the defendant's consent, and that the proceeds were to be under his control. In *Ex parte Deeze*, 1 Atk. 228, Lord HARDWICKE is reported to have put it as a case of mutual credit, if a man had goods in his hands belonging to a debtor of his, which could not be got from him without an action at law or a bill in equity. Now that is the case here; for these goods could not have been given up to the bankrupts against the consent of the defendant, except by some proceedings of that nature. This, therefore, is a case of mutual credit, and the defendant is entitled to our judgment.

Rule discharged.

WELLS v. GREENHILL.—p. 569.

By a composition-deed, reciting that the insolvent was indebted in certain sums to J. P. for rent, to the crown for duties, to A. and B. upon judgment, and to the other creditors in the sums of money set opposite their names in the schedule, the insolvent bargained and sold to trustees all his leasehold messuages, subject to certain mortgages, and all his personal estate whatsoever, upon trust to carry on the brewing and making business for the benefit of the creditors, and to collect outstanding debts, and to sell the farming stock, and out of the moneys arising from the sale of any part of the estate that should be mortgaged, to satisfy the mortgage, and to stand possessed of the residue upon trust to pay J. P. the rent due to him, the duties due to the crown, the rent which was, or thereafter should become due for any of the premises assigned, the interest upon the mortgages, then the judgment debt due to A. and B., then to pay all the creditors whose debts did not amount to 10*l.* in full, and at the expiration of nine months to pay all the other creditors the amount of 5*s.* in the pound. There was a covenant by the creditors that they would release their respective claims to the insolvent. The indenture contained a proviso, that in case any creditor whose debt should amount to 100*l.*, or any two creditors whose debts should amount to 150*l.* should not execute within three calendar months, the deed should be void. A. and B., the judgment creditors, whose debt exceeded 150*l.*, did not execute the deed within the time required: *Held*, that the deed was not thereby rendered void, the intention manifestly being that those creditors only who were to receive a composition under the deed, were to execute it.

DECLARATION against the defendant, as the maker of several promissory notes, bearing date in September, 1818, and May, 1819. Plea, non-assumpsit. At the trial, before ABBOTT, C. J., at the Middlesex sittings after last Michaelmas term, the only question was, whether the defendant was discharged from the plaintiff's claim by the provisions of a composition-deed. It appeared that by a lease and release, of the 12th and 13th October, 1819, made between the defendant of the one part, and certain trustees named therein of the other part, the defendant conveyed all his freehold property, and covenanted to surrender all his copyhold hereditaments, subject to the mortgages affecting the same, unto the trustees, their heirs and assigns, upon trust, to sell the same, and to stand possessed of the money to arise therefrom, upon trust, to pay the costs of the sale and the mortgages affecting the

premises, and to pay the residue thereof as the defendant should direct. By indenture of the 13th October, 1619, between the defendant of the first part, the said trustees of the second part, and the several persons whose names and seals were subscribed and affixed, creditors of the third part, reciting, that the defendant was indebted to W. S. Poyntz, in 153*l.* for rent; to the crown, in 413*l.* for duties; to Messrs. Stoveld and Upperton in 400*l.* upon a bond and judgment; and to W. Dennett, R. Wardropper, J. Stunington, and the parties thereto, of the third part, in the sums of money set opposite to their names in the schedule thereto; and that, being desirous to make provision for the payment of all his debts, he had agreed, with the consent of the parties thereto, to convey, surrender, and assign, all his real and personal estate and effects unto the trustees, upon the trusts, and subject to the provisions hereinafter mentioned; and, also, reciting the indenture of lease and release, it was witnessed, that, for effectuating the purposes aforesaid, in consideration of the covenant on the part of the creditors, and for the nominal consideration of 10*s.*, the defendant bargained and sold unto the trustees all his leasehold messuages, subject to the mortgages affecting the same, and all his stock in trade, &c., book and other debts, farming stock, and all his personal estate whatsoever, upon trust for eighteen months to carry on the brewing and malting business for the benefit of the creditors, to collect outstanding debts, and to sell the farming stock and all other effects of the defendant, and out of the moneys arising from the sale of any part thereof as should be mortgaged, to pay and satisfy the mortgagees, and to stand possessed of the residue of the moneys, upon trust to pay the costs of the trust-deeds, then to pay Poyntz the rent due to him, the duties due to the crown, the rent which then was or thereafter should become due for any of the premises assigned, the interest which then was or thereafter should become due upon the mortgages, then to pay the debt due to Stoveld and Upperton, upon their bond and judgment, with interest; then to pay in full all the creditors whose debts did not amount to 10*l.*; then, at the expiration of nine months, to pay all the other creditors named in the schedule the amount of 5*s.* in the pound on their respective debts, without preference or priority; and after the expiration of eighteen months, the period of management of the brewing and malting business, or as soon as conveniently might be, to convert all the remaining trust-estate, and get in all the remaining debts, to pay all debts and expenses of the trust, and all incumbrances, and to stand possessed of the residue upon trust, to apply the same towards the full discharge of so much of the debts of the creditors named in the schedule as should be then remaining unpaid, rateably and without any preference; and, lastly, to pay the surplus (if any) of the trust-estate to the defendant. There then followed a covenant, by the creditors who executed the deed, that if the indenture did not become void by virtue of the proviso therein contained, the respective creditors would, at any time after the determination of the eighteen months, release to the defendants all actions, claims, and demands whatsoever on his estate for or on account of any debts due or owing by the defendant, or for any other matter

or thing whatsoever, and that they would not in the meantime commence any action against him. The indenture then contained a proviso, that in case any creditor, whose debt should amount to 100*l.* or upwards, or any two creditors whose debts should amount to 150*l.* or upwards, should not execute the indenture within three calendar months, that the deed should be void. The schedule at the foot of the deed contained a list of the persons who were creditors on the 13th October, 1819, and the amount of their respective debts, and the name of the plaintiff was inserted therein for 226*l.* The indentures of lease and release, and of assignment, were duly executed by the defendant and the trustees; and the assignment was also executed by the plaintiff, Wells, and all the other creditors named in the schedule, within three calendar months; except Stoveld and Upperton, creditors for 400*l.* upon the bond and judgment; J. H. and J. T. creditors for rent; and G. M. a creditor for 20*l.* for interest of mortgage money. By the trusts of the deed, these several parties were entitled to be paid in full. The trustees took possession of the estate of the defendant under the deed and sold part, and have received the rents and profits, and collected the debts due to the defendant, and have applied the money arising from the sale of the mortgaged estates, in discharge of the principal and interest of the mortgages; and they also, during eighteen months, carried on the brewing and malting business, and paid the excise duties, rent, taxes, and other outgoing, and the interest of the mortgages, the 400*l.* due to Stoveld and Upperton, and the debts of such of the creditors as did not amount to 10*l.*, but in consequence of a deficiency of the assets, they had not been able to pay the other creditors any dividend on account of their debt. It was contended at the trial on the part of the plaintiff, that the deed was void because Stoveld and Upperton had not executed it. The Lord Chief Justice, however, was of opinion, that that was not necessary, and the plaintiff was nonsuited, but leave was reserved to move to enter a verdict for the plaintiff, if the Court should be of opinion that the deed was void in consequence of its not having been executed by Stoveld and Upperton. A rule nisi having been obtained accordingly,

Marryat and *Courthope* now showed cause. The proviso does not extend to those creditors whose debts by the terms of the deed were to be paid in full. If it did, it would follow that the deed should have been executed by somebody on the part of the crown and by the mortgagees. The object of the deed was, to enable the trustees to raise funds by carrying on the trade for 18 months, and thereby to pay the debts in whole or in part of those creditors, who, at the time of executing the deed, had no means of compelling instant payment. The debt of the crown at that time might have been levied by an extent, the rent might have been levied by distress, and the debt of the judgment creditor by instant execution. By the provisions of the deed, therefore, those creditors were to be paid in the first instance, and they might have been paid within three months after the date of the deed, and if Stoveld and Upperton had been paid their debt within three months, it certainly could not have been necessary for them to

become parties to a deed, from which they could derive no benefit whatever.

Gurney and Curwood, contra. The words of the proviso are, "that if any creditor whose debt amounts to 100*l.*, or any two creditors whose debts amount to 150*l.* should not execute the deed within three calendar months, it should be void." Now Stoveld and Upperton were creditors for 400*l.*, and did not execute the deed within the time required, they therefore come within the very words of the proviso, and consequently the deed is void. [BAYLEY, J. A mortgagee whose debt exceeds 200*l.* is a creditor within the words of the proviso, but surely it was not necessary for him to execute the deed?] A mortgagee could derive no benefit from the deed, because by the terms of the mortgage deed, there probably was reserved to him a power of sale upon non-payment of the principal and interest. He therefore had it in his power to compel payment, but Stoveld and Upperton, who were judgment creditors, might derive some advantage from the trade being carried on for 18 months, for during that time funds might be acquired sufficient to satisfy their debt, and possibly at the time of executing the deed, there might not have been sufficient effects of the defendant liable to be taken in execution by Stoveld and Upperton.

ABBOTT, C. J. The question in this case turns on the effect of the proviso, by which the deed was to be void in case any creditor whose debt amounted to 100*l.* or upwards, or any two creditors whose debts should amount to 150*l.* or upwards, should not execute it within three months. Now, the words "any creditor," are certainly large enough to comprise all those to whom the defendant owed money; but we are to look at the whole deed to learn whether those words are used in a general or limited sense. If they are used in the former sense, they would clearly include a mortgagee. But it is conceded in argument that they do not apply to him. Then if so, they are clearly used in a limited sense, and the question is how far they are limited. Now, that can only be ascertained by looking at the whole deed, which is made between the defendant of the first part, certain trustees of the second part, and certain creditors therein named of the third part, and it recites that the defendant was indebted to Poyntz 153*l.* for rent, to the crown 413*l.* for duties, to Stoveld and Upperton 400*l.* upon bond and judgment, and to the creditors named of the third part, in the sums of money set opposite their names in the schedule. Now, it is observable that Stoveld and Upperton are here mentioned and distinguished from the creditors of the third part. The deed then conveys the property of the defendant to trustees upon trust, to pay the rent due to Poyntz, the duties due to the crown, and the judgment-debt to Stoveld and Upperton, and then to pay all the creditors whose debts are under 10*l.* in full, and after that 5*s.* in the pound to all other the creditors mentioned in the schedule. The deed also contains a covenant, that the creditors who executed the indenture would release their claims on the defendant. Now, if Stoveld and Upperton had executed the deed, they would have been parties to this latter covenant, and the effect of that would be, to make them covenant to release that debt, which by the provisions of the deed had been previously agreed to be paid in full

But this would be an inconsistent provision. I think, therefore, upon an attentive perusal of the deed, that it could not have been the intention that Stoveld and Upperton should execute the deed, but only those who were to receive the composition under the deed. That being so, the rule for entering a verdict for the plaintiff must be discharged.

Rule discharged.

EDWARD BLISS v. JAMES COLLINS.—p. 876.

Two messuages were conveyed to such uses as A. should appoint, and in default of appointment to A. to life, and after the determination of that estate in his lifetime to B. for the life of A., in trust for A. and his assigns; with remainder to A. in fee. A. leased both these messuages to a tenant at an entire rent of 65*l.* 10*s.*, for a term of years, and during the continuance of that term, contracted to sell the reversion of one of the messuages to C. In the contract the messuage was described on lease, together with another, and that the apportioned rent in respect of it was 40*l.* A. and B. afterwards conveyed the reversion of both houses, and the entire rent of 65*l.* 10*s.*, unto D. to certain uses, viz.: as to the said messuage which A. had contracted to sell, and the yearly rent of 40*l.*, together with all powers and remedies reserved for recovering the rent of 65*l.* 10*s.*, to such uses as A. should appoint; and as to the other messuage and the residue of the entire rent to the use of A. in fee. A. afterwards appointed the messuage which he had contracted to sell, and the apportioned rent to the vendee: *Held*, that the latter did not acquire the same rights and remedies against the lessee as he would have acquired if the rent had been legally apportioned by a jury, the lessee for the term not being bound by an apportionment made without his consent.

The following case was sent by the Vice-Chancellor for the opinion of this Court.

By lease and release bearing date respectively the 28th and 29th of March, 1808, the release being made between John Lovett of the first part, Edward Bliss of the second part, James Roche of the third part, the said Edward Bliss of the fourth part, and William Bliss of the fifth part, for the considerations therein expressed; two several messuages or tenements in Princes Street, Red Lion Square, in the county of Middlesex, one called the White Bear, public house, and the other next adjoining thereto with their appurtenances, were with other hereditaments therein particularly described, conveyed and limited to such uses as Edward Bliss should by deed appoint, and in default of appointment, to the use of the said Edward Bliss and his assigns during his life; and after the determination of that estate in his life time, to the use of William Bliss and his heirs, during the life of Edward Bliss, in trust for Edward Bliss and his assigns, with remainder to the use of Edward Bliss, his heirs and assigns for ever. By a lease of the 29th September, 1810, made between Edward Bliss of the one part, and James Remmonds of the other part, for the considerations there expressed, the said Edward Bliss did demise unto the said James Remmonds the said messuage or tenement called the White Bear, public house, and the said messuage or tenement adjoining thereto with their appurtenances, to hold to him from thenceforth for 21 years, at the yearly rent of 65*l.* 10*s.* Edward Bliss, on the 15th of March, 1814, duly contracted to sell the said messuage or tenement called the White Bear with the

appurtenances, to the defendant, Collins, and by the printed particulars of sale it was declared that that house, with a house adjoining, was on lease to Remmonds, and that the apportioned rent in respect of the public house, was 40*l.* per annum. The defendant, Collins, having refused to complete his purchase, Edward Bliss filed his bill in the Court of Chancery against the defendant, for a specific performance of this contract. By lease and release, dated respectively the 23d and 24th of March, 1819, the release being between Edward Bliss of the first part, William Bliss of the second part, and Samuel Harris of the third part; after reciting the lease and release of the 28th and 29th March, 1808, and the lease of the 29th of September, 1810, and the sale of the public house called the White Bear, to defendant, Collins; and that, in order to effect a legal apportionment of the entire rent of 65*l.* 10*s.*, preparatory to the conveyance to Collins of the purchased premises, Edward Bliss had determined, with the acquiescence of the said Samuel Harris, to grant and release the two several messuages and tenements therein-before mentioned, and the reversion and inheritance thereof subject to the lease, and also to the entire rent of 65*l.* 10*s.* reserved by the lease unto the said Samuel Harris, to the several uses thereafter limited concerning the same; it was witnessed that for the considerations in the said indenture of release expressed, Edward Bliss did grant, bargain, sell, alien, release and remise, and for ever quit claim, and the said William Bliss did bargain, sell, and release unto the said Samuel Harris and his heirs, all those two several messuages or tenements with the appurtenances therein described, to hold the said messuages and premises subject to the lease, and the term thereby granted and then unexpired, unto Samuel Harris, his heirs and assigns, to the uses thereafter declared, (that is to say) as for and concerning the said public house, the White Bear, with the appurtenances, and also as concerning the yearly rent of 40*l.*, part of the entire rent of 65*l.* 10*s.* reserved by the lease, together with all powers and remedies reserved in the said lease for recovering the rent of 65*l.* 10*s.*, so far as such powers relate to the said apportionment rent of 40*l.*, to the use of such persons for such estate, and in such proportions as the said Edward Bliss should appoint, and until appointment, and subject to such uses, estates, trusts, charges, and interests as should have been directed, limited, or appointed by the said Edward Bliss to the use of the said Edward Bliss and his assigns during his life, with a limitation to William Bliss and his heirs during the life of the said Edward Bliss upon trust for him; with remainder to the use of the said Edward Bliss, his heirs and assigns for ever, and, as for and concerning the said messuage or tenement adjoining the last mentioned messuage or public house, called the White Bear, with the appurtenances; and as concerning the said yearly rent of 25*l.* 10*s.*, residue of the said entire rent of 65*l.* 10*s.* reserved by the said lease, together with all powers reserved in the said lease for recovering the entire rent, to the use of William Bliss, his heirs and assigns for ever. By lease and release, bearing date respectively since the date of the last mentioned indentures, the release being between Edward Bliss of the first part, William Bliss of the second part, and

James Collins of the third part, the said messuage or tenement, and public house called the White Bear, with the appurtenances, and also the yearly rent of 40*l.*, part of the entire rent of 65*l.* 10*s.* reserved by the said indenture of lease, together with all powers and remedies reserved in the said lease for recovering the rent of 65*l.* 10*s.*, so far as such powers relate to the apportioned rent of 40*l.* were appointed, limited, and conveyed by Edward Bliss and William Bliss, unto, and to the use of the said James Collins, his heirs and assigns for ever.

The question directed by the Vice-Chancellor for the opinion of this Court was, whether the purchaser of the estate in question had, by the aforesaid conveyance of the vendor and his trustee alone, without the concurrence of the lessee, acquired the same rights and remedies against the lessee in respect of the apportioned rent of 40*l.* therein reserved to him, as he would have acquired in case no rent had been mentioned in such conveyance from the vendor and his trustee, and the annual rent of 40*l.* had been legally apportioned by a jury for that part of the reversion of the premises in question. This case was, in part, argued at the sittings before last Michaelmas term, by

Sugden, for the plaintiff. The lessor may apportion the rent without the concurrence of the lessee. Where the reversion is severed by a grant of part of the premises, a rent service, incident to the reversion, is to be apportioned, (Co. Litt. 148 a, and *Collins and Harding's case*, 13 Co. 57 a;) and if there be no apportionment at the time, and the two reversions cannot agree, then in an action of debt brought by one of them for the rent, a jury is to ascertain the proportion in which it is to be divided between them. This becomes necessary only for the purpose of settling the respective rights of the reversioners, and not with a view to the interests of the tenant. If the lessor, by the instrument conveying part of the premises, fixes the amount of rent which is to accompany it, the rights of the reversioners do not admit of dispute, and an apportionment by a jury is not requisite. The tenant will not be prejudiced by being compelled to pay a particular portion of rent out of a particular portion of the property. The entire rent before issued out of the entire land, and the landlord might distrain upon every acre of the land for the whole rent; and though the lessee may have underlet a part at a smaller rent, it is equally liable. In *Walter v. Maunde*, 1 Jac. & Walk. 181, the Master of the Rolls decided that a landlord contracting to sell part of a demised estate, with an apportioned rent, could make a good title to the apportioned rent without the consent of the tenant, and intimated a very strong opinion that the purchaser of part would have the same remedies for the apportioned rent as the original landlord would have had for the entire rent.

The Court, after hearing *Sugden*, stated that they thought it necessary to confer with the Vice Chancellor before they heard the case further argued. In last term it was again argued by

Preston, for the plaintiff. It may be admitted that, consistently with the authorities, the rent could not be apportioned by a vendor and purchaser so as to bind the tenant. The purchaser, however, has the

same rights and remedies against the lessee in respect of the apportioned rent as he would have had in case no rent had been mentioned in the conveyance from the vendor, and the annual rent of 40*l.* had been apportioned by a jury. It is clear that a rent may be apportioned: Co. 1 Inst. 147; 2 Inst. 505, and Bacon's Abr. tit. Rent, M., are authorities in point. The passage in 2 Inst. 504, is full and explicit: "If a man make a lease for years, reserving a rent, if he grant away part of the reversion, the rent shall be apportioned by the common law, and albeit the grantee of part demand or claim more in his action of debt or avowry than is due, yet shall he recover so much as the jury shall find upon a just apportionment to be due." And for this, four reasons are given. "1st, For, that it is a rent-service, and not a bare contract, and rent-services were apportionable at the common law. 2d, It is incident to the reversion, which is severable et accessorium sequitur naturam sui principalis. 3d, The rent being a rent-service is severable by recovery of part in an action of waste, or upon surrender in part. 4th, It is a general case, and specially in case of wills, which many times are void for a third part."* [ABBOTT, C. J. The authorities go to establish this position, that there are two modes of apportioning rent, one by granting the reversion of part of the land out of which the rent issues; the other by granting part of the rent to one person and part to another. In the present case, each portion of the rent issues out of the whole land. BAYLEY, J. Suppose the grantee to distrain for 40*l.* rent, the avowry must state that the tenant held it at an annual rent of 40*l.*] It may be admitted, that the avowry must so state the title to the rent; but the reversioner may recover a less sum than 40*l.*, though he states the tenancy to be at 40*l.* a year. However, it is conceded, that unless this case assumes that the rent has been duly and legally apportioned, there is great difficulty in arguing the plaintiff's case on grounds which are tenable. It is incumbent on the defendant to show that his remedies at law are different, in consequence of the rent being apportioned by the lessor, than they would have been if the rent had been apportioned by a jury. The right of re-entry for non-payment of rent is gone, because the condition was entire. The grantee has a remedy for the rent by distress, or by bringing an action of debt or covenant. These propositions are established by the passage already cited from 2 Inst. 504. The same doctrine is to be found in Bacon's Abr. tit. Rent, M: "If A., possessed of a term for 20 years, leases it for 10 years, reserving 30*l.* rent, and afterwards A. devises 20*l.* of the rent to three of his sons, equally to be divided; this is a good devise, and each of the sons shall have an action of debt for his third part, though the reversion to which the rent was originally incident remains entire." Now, in the case put, the lessor divides the rent by his own act only, and he might divide it into as many parts as he pleases, obliging the tenant to pay each separately, and rendering him liable to different remedies. This power, of apportioning the rent by the lessor, will be beneficial to the tenant, by pre-

venting the necessity of an action of debt for the purpose of having the apportionment made by the jury. And it is observed by Lord Ch. B. GILBERT, that the apportionment imposes no hardship on the tenant; for, though it subjects him to several actions and distresses, he may always avoid them by punctual payment.

Chitty, contra. The apportionment can only be legally made by the lessor, with the consent of the lessee, or by the verdict of a jury. It cannot even be made by the Court. This is so laid down in Bacon's Abr. tit. Rent, M., where all the authorities are collected. Indeed, if this apportionment be valid, how is the tenant to know what sum he is to tender to the person claiming the rent? If the reversion belongs to two tenants in common, the tenant cannot discharge himself against one by paying too much to the other; but the former may distrain. *Harrison v. Barnby*, 5 Term Rep. 246. If this apportionment is valid, the tenant may, without notice, pay too much to either. It is clear that if there be a right of re-entry reserved to the purchaser of part of the premises, he cannot enter alone; neither can he distrain, because the tenant, who has contracted only for the payment of an entire rent, is not subject to distress except for the whole. If the tenant concurs in the conveyance, and makes himself tenant to the purchaser at the apportioned rent, the latter will have all the remedies against the tenant which he would have had if the apportioned rent had been originally reserved. Here the tenant did not concur in the apportionment, and it cannot, therefore, be binding upon him.

Preston, in reply. The form of the question assumes that the apportionment is equivalent to one by a jury, and the only question is, whether the landlord has the same remedies in one case as in the other. If the Court does not so consider the question, no reason can be offered for the right of binding the tenant by an apportionment to which he was not a party.

The following certificate was afterwards sent:

We have heard this case argued by counsel, and are of opinion, that the purchaser of the estate in question hath not, by the aforesaid conveyance, acquired the same rights and remedies against the lessee as he would have acquired if the rent had been legally apportioned by a jury; inasmuch as we think that the lessee is not bound by this apportionment, made without his consent, but may dispute the propriety thereof, and cause the rent to be apportioned anew by a jury.*

C. ABBOTT
J. BAYLEY,
G. S. HOLROYD,
W. D. BEST.

ARDEN *v.* CONNELL.—p. 885.

In debt for use and occupation after judgment by default; *Semble*, that a writ of inquiry is necessary before signing final judgment.

DEBT for use and occupation, in the Palace Court. Judgment by default. The prothonotary of that court would only permit interlocutory judgment to be signed, and expressly refused to suffer the plaintiff to enter up final judgment; and, on an application to the judge of that court, he refused to interfere.

Thesiger now moved for a mandamus to the judge of that court, requiring him to permit final judgment to be signed; and he contended, that by the general practice in actions of debt, the plaintiff was entitled to have final judgment. In writs of inquiry the jury were sworn to assess the damages between the parties; but in debt nominal damages only were given. A writ of inquiry was, therefore, nugatory, and of course an interlocutory judgment would be irregular.

HOLROYD, J.* It is not true as a universal proposition, that in debt, where the defendant suffers judgment by default, the plaintiff is entitled to final judgment without executing a writ of inquiry. In actions on the stat. of Edw. 6, for not setting out tithes, there must be a writ of inquiry to ascertain the value of the tithe; so in an action of debt for foreign money, a jury must find the value of the money. In the old form of declarations of debt, the contract stated was, that A. sold to B. a horse for a particular sum; and if the defendant suffered judgment to pass by default, he was considered thereby to acknowledge that the whole sum was due. I think, therefore, that it is not by any means clear that a writ of inquiry is not necessary in this case, and that being so, I think that no mandamus ought to issue.

Rule refused.

* The only Judge in Court.

FRANCIS *v.* CRYWELL.—p. 886.

Declaration for tithes bargained and sold. Plea, that before the exhibiting of the plaintiff's bill the defendant paid to the plaintiff a sum of money, parcel, &c., in discharge and satisfaction of the promises in the declaration mentioned, and that plaintiff accepted the same in satisfaction and discharge of the promises. Replication, that before the exhibiting of the bill, the plaintiff had sued out a *latitat*, and that the defendant did not, before the plaintiff sued out that writ, pay the plaintiff the said sum of money in manner and form as the defendant has alleged. Upon demurrer, it was *held*, that the plea was bad, because it did not allege the payment to have been in discharge of the costs and damages accrued by reason of the non-performance of the promises.

ASSUMPSIT for tithes bargained and sold. Plea, that before the exhibiting of the bill of the plaintiff, the defendant paid to the plaintiff the sum of 19*l.* parcel, &c. in discharge and satisfaction of the promises and undertakings in the declaration mentioned, as to the said sum of 19*l.*

parcel, &c.; and the plaintiff accepted and received the said sum, in satisfaction and discharge of the said premises and undertakings. Replication, that before the exhibiting of the bill, plaintiff had sued out a latitat, and that the said defendant did not, at any time before the plaintiff prosecuted that writ, pay to the plaintiff the said sum of 19*l.* parcel &c., in manner and form as the said defendant had above in his said plea alleged. To this replication there was a demurrer and joinder.

Manning, in support of the demurrer. The plea of accord and satisfaction, after action brought, is a good bar to the action, Com. Dig. Pleader, 2 G. 10, and it may be pleaded generally, although the payment and acceptance, which form the gist of the plea, were subsequent to the issuing of the writ, for here there was no continuance. In Clift's Entries (p. 202) there is a precedent of a plea exactly similar to that which is pleaded in the present case, and Lord C. B. COMYNS refers to it, as an authority for the principle above mentioned. In *Holland v. Jourdine*, 1 Holt, N. P. C. 6, Lord C. J. GIBBS expressly ruled that payment by a defendant, of the debt *and costs*, after action brought, although he held a receipt for the sum paid, was no answer to the action under the *general issue*, but was the subject-matter only of a special plea. In *Sullivan v. Montague*, Dougl. 109, it was conceded in argument, that a matter of defence arising after action brought, might be specially pleaded. The plea in the present case is in accordance with this rule, and by showing that payment was made in discharge of the promises and undertakings mentioned in the declaration, offers a sufficient answer in law to the action. It is true that the plea does not allege payment of the damages accruing by reason of the non-performance of the promises and undertakings in the declaration; but that omission is supplied by the plaintiff's acceptance of the sum tendered to him, and having so elected to take that sum in discharge of the claim set out in the declaration, he is thereby precluded from taking the objection that a larger sum ought to have been paid. In *Perry v. Odingsell*, 4 Mod. 250, the defendant pleaded payment of the debt only. It is not usual, in ordinary pleas of payment before action brought, to aver that the money was paid in satisfaction of the damages. This is similar to the plea of solvit post diem to debt on bond, which has been decided to be a good bar, although the payment of interest was not alleged. It does not appear from the replication that any further sum was due, and the presumption is in favour of the defendant, who alleges a payment, accepted without dispute by the plaintiff.

Justice, contra, was stopped by the Court.

ABBOTT, C. J. The plea avers that the sum was paid and accepted only in satisfaction of the promises and undertakings in the declaration, before the exhibiting of the bill by the plaintiff. The replication, by setting out a writ issued prior to the payment and acceptance, shows a further demand to which the defendant was liable; viz. the costs of the writ. The plea, therefore, to have been a sufficient bar, should have alleged a payment in discharge, not only of the promises and undertakings in the declaration, but of all costs and damages accrued by reason

of the non-performance of those promises and undertakings. That allegation being omitted, the plea is incomplete, and is not a legal bar to the action.

BAYLEY, J. In the usual case of a plea of payment before action brought, it does not appear upon the record that the plaintiff has sustained any damage by the non-payment at the stipulated time. Assuming this to have been a good plea when pleaded, yet it now appears by the replication that the plaintiff has been damnified by being compelled to issue a writ. The defendant might have rejoined that the money was accepted in satisfaction of the damages, as well as of the promises.

HOLROYD, J. It was decided in *Perry v. Odingsell*, 4 Mod. 250, that payment after the day is good by way of discharge, but not of satisfaction. In covenant for non-payment of rent, liens in arrear is a bad plea, because it confesses the covenant to be broken, and tends only in mitigation of damages. Here, upon the whole record, it appears that the plaintiff had a cause of action, in respect to which, he has sustained a damage which is yet unsatisfied. The defendant ought to have pleaded that the money was paid in satisfaction of the damages sustained by the non-performance of the promises.

Judgment for the plaintiff.

JAMES and Wife v. TALLENT.—p. 889.

The condition of a bond recited that the obligor had cohabited with a woman for several years, and had by her two children therein named, and that she being desirous to put an end to the connexion, had applied to the obligor to make a provision for herself and children, which he had agreed to do, and for that purpose the obligor entered into the bond in question, which was conditioned to pay to the mother yearly, during the joint natural lives of herself and two children, a certain sum therein mentioned, the annuity to be applied to the maintenance and education of the children as well as herself; or in case of the death of the two children therein specially named, then the same annuity was to be payable to her during her life. One of the children died during the lifetime of the mother: *Held*, that the annuity was payable to her during her life at all events.

DEBT against the defendant as executor of one Packard, deceased, upon a bond given by the latter to Susanna James, while she was sole and unmarried, for 500*l*. The condition set out in the declaration recited, that John Packard had for several years cohabited with the said Susanna, then S. Danby, and had by her two children, G. Danby and L. Danby, and that she being desirous to put an end to such connexion, had requested Packard to make a suitable provision for herself and children, which he had agreed to do; and that she, at the request of Packard, had procured two sureties to enter into a bond to indemnify him against molestation; and that, for the purpose of making the provision, Packard had agreed to enter into the bond declared upon, the condition of which was declared to be, that if Packard should pay to Susanna yearly, during the time of the joint natural lives of S. Danby, G. Danby, and L. Danby, an annuity of 30*l*. payable by four equal payments as therein mentioned, the said annuity to be applied to the main-

parcel, &c.; and the plaintiff accepted and received the said sum, in satisfaction and discharge of the said premises and undertakings. Replication, that before the exhibiting of the bill, plaintiff had sued out a latitat, and that the said defendant did not, at any time before the plaintiff prosecuted that writ, pay to the plaintiff the said sum of 19*l.* parcel &c., in manner and form as the said defendant had above in his said plea alleged. To this replication there was a demurrer and joinder.

Manning, in support of the demurrer. The plea of accord and satisfaction, after action brought, is a good bar to the action, Com. Dig. Pleader, 2 G. 10, and it may be pleaded generally, although the payment and acceptance, which form the gist of the plea, were subsequent to the issuing of the writ, for here there was no continuance. In *Clift's Entries* (p. 202) there is a precedent of a plea exactly similar to that which is pleaded in the present case, and Lord C. B. COMYNS refers to it, as an authority for the principle above mentioned. In *Holland v. Jourdine*, 1 Holt, N. P. C. 6, Lord C. J. GIBBS expressly ruled that payment by a defendant, of the debt *and costs*, after action brought, although he held a receipt for the sum paid, was no answer to the action under the *general issue*, but was the subject-matter only of a special plea. In *Sullivan v. Montague*, Dougl. 109, it was conceded in argument, that a matter of defence arising after action brought, might be specially pleaded. The plea in the present case is in accordance with this rule, and by showing that payment was made in discharge of the promises and undertakings mentioned in the declaration, offers a sufficient answer in law to the action. It is true that the plea does not allege payment of the damages accruing by reason of the non-performance of the promises and undertakings in the declaration; but that omission is supplied by the plaintiff's acceptance of the sum tendered to him, and having so elected to take that sum in discharge of the claim set out in the declaration, he is thereby precluded from taking the objection that a larger sum ought to have been paid. In *Perry v. Odingsell*, 4 Mod. 250, the defendant pleaded payment of the debt only. It is not usual, in ordinary pleas of payment before action brought, to aver that the money was paid in satisfaction of the damages. This is similar to the plea of solvit post diem to debt on bond, which has been decided to be a good bar, although the payment of interest was not alleged. It does not appear from the replication that any further sum was due, and the presumption is in favour of the defendant, who alleges a payment, accepted without dispute by the plaintiff.

Justice, contra, was stopped by the Court.

ABBOTT, C. J. The plea avers that the sum was paid and accepted only in satisfaction of the promises and undertakings in the declaration, before the exhibiting of the bill by the plaintiff. The replication, by setting out a writ issued prior to the payment and acceptance, shows a further demand to which the defendant was liable; viz. the costs of the writ. The plea, therefore, to have been a sufficient bar, should have alleged a payment in discharge, not only of the promises and undertakings in the declaration, but of all costs and damages accrued by reason

of the non-performance of those promises and undertakings. That allegation being omitted, the plea is incomplete, and is not a legal bar to the action.

BAYLEY, J. In the usual case of a plea of payment before action brought, it does not appear upon the record that the plaintiff has sustained any damage by the non-payment at the stipulated time. Assuming this to have been a good plea when pleaded, yet it now appears by the replication that the plaintiff has been damaged by being compelled to issue a writ. The defendant might have rejoined that the money was accepted in satisfaction of the damages, as well as of the promises.

HOLROYD, J. It was decided in *Perry v. Odingsell*, 4 Mod. 250, that payment after the day is good by way of discharge, but not of satisfaction. In covenant for non-payment of rent, liens in arrear is a bad plea, because it confesses the covenant to be broken, and tends only in mitigation of damages. Here, upon the whole record, it appears that the plaintiff had a cause of action, in respect to which, he has sustained a damage which is yet unsatisfied. The defendant ought to have pleaded that the money was paid in satisfaction of the damages sustained by the non-performance of the promises.

Judgment for the plaintiff.

JAMES and Wife v. TALLENT.—p. 889.

The condition of a bond recited that the obligor had cohabited with a woman for several years, and had by her two children therein named, and that she being desirous to put an end to the connexion, had applied to the obligor to make a provision for herself and children, which he had agreed to do, and for that purpose the obligor entered into the bond in question, which was conditioned to pay to the mother yearly, during the joint natural lives of herself and two children, a certain sum therein mentioned, the annuity to be applied to the maintenance and education of the children as well as herself; or in case of the death of the two children therein specially named, then the same annuity was to be payable to her during her life. One of the children died during the lifetime of the mother: *Held*, that the annuity was payable to her during her life at all events.

DEBT against the defendant as executor of one Packard, deceased, upon a bond given by the latter to Susanna James, while she was sole and unmarried, for 500*l*. The condition set out in the declaration recited, that John Packard had for several years cohabited with the said Susanna, then S. Danby, and had by her two children, G. Danby and L. Danby, and that she being desirous to put an end to such connexion, had requested Packard to make a suitable provision for herself and children, which he had agreed to do; and that she, at the request of Packard, had procured two sureties to enter into a bond to indemnify him against molestation; and that, for the purpose of making the provision, Packard had agreed to enter into the bond declared upon, the condition of which was declared to be, that if Packard should pay to Susanna yearly, during the time of the joint natural lives of S. Danby, G. Danby, and L. Danby, an annuity of 30*l*. payable by four equal payments as therein mentioned, the said annuity to be applied to the main-

tenance, clothing, and education of the said G. Danby and L. Danby, as well as for the maintenance and support of Susanna Danby; or in case of the death of the said G. Danby and L. Danby, if Packard should, after that event happened, pay unto the said Susanna Danby yearly, during her natural life, an annuity of 30*l*. on the days therein before mentioned, or if during the payment of the first mentioned annuity, the said S. Danby should molest or interrupt the said Packard, then the obligation should be void. Breach, that after the death of L. Danby, but during the lifetime of the said G. Danby, and the said Susanna Danby, to wit, on the 25th December, 1821, the sum of 7*l*. 10*s*. of the annuity became due, which the defendant refused to pay. Plea, that Packard, in his life time, well and truly paid the annuity during the joint and natural lives of Susanna Danby, George Danby, and Louisa Danby, and that in the lifetime of the said G. Danby, and before the said sum of 7*l*. 10*s*. became due to the said S. Danby, the said Louisa Danby died, and the said G. Danby is now living. To this plea there was a general demurrer.

Chitty, in support of the demurrer, contended that it was the manifest intention of the parties that the annuity should be payable to Susanna Danby at all events during her life. The contrary construction would give the mother an interest in the death of the surviving child; because, until that event happened, the annuity would not be payable at all.

Robinson, contra. The words of the bond are set out according to the legal effect, not the tenor; and the breach assigned does not correspond with the condition, that is, that Packard, during the joint lives of Susanna Danby, George Danby, and Louisa Danby, should pay to S. Danby, yearly, an annuity of 30*l*., or in case George Danby and L. Danby die, he should pay another annuity to Susanna Danby. The first annuity is to be payable only during the continuance of the three joint lives; the second is to be payable only on the determination of two of the lives. The breach assigned is, that after the death of L. Danby, and during the lives of Susanna and George Danby, the defendant did not pay. Now the breach is not within the condition, either in terms or effect; for *joint* lives mean the lives of all; and *in case G. and L. Danby die*, means in case both of them die. If the argument on the part of the plaintiff be well founded, he might have set out the effect of the bond to be according to the fact that has happened. He might have stated that the condition of the bond was, that if Packard, during the lives of Susanna and George Danby, should pay, and averred that Susanna and George were living; and if the defendant had pleaded non est factum he would, according to the plaintiff's argument, have been entitled to recover. If, on the other hand, the defendant would have had judgment on that plea, he must have judgment now, because the breach does not come within the meaning of the condition. The defendant's plea is good, for it is, in the first part, a plea of performance in the very words of the condition; and as to the second part, it shows that that condition precedent has not taken place, without which the obligation does not arise.

ABBOTT, C. J. We must look at the whole of the instrument, and must put such a construction upon it as will answer the manifest intention of the parties. Here the annual sum is the same, and is payable on the same days in every event; and the object appears from the recital of the bond to have been to provide for the mother as well as for the children; and if both the children die, the mother is to have the annuity for her life. It appears to me, therefore, to have been the manifest intention, that the annuity should be payable at all events during the life of the mother. That being so, I think that the plaintiff is entitled to the judgment of the Court.

Judgment for the plaintiff.

COX v. BUCKNELL.—p. 892.

Where a plaintiff had issued one writ against three defendants for separate causes of action, and after delivering three separate declarations *de bene esse*, entered one common appearance according to the statute for all the three defendants, and signed three interlocutory judgments as for want of a plea: *Held*, that this was irregular.

Campbell moved to set aside the judgment in this case for irregularity, with costs. There was only one writ issued against the defendant and three other persons for separate causes of action. The plaintiff filed separate declarations conditionally against the defendant and two of the other persons to plead within the first four days of this term, and three separate rules to plead were given. Subsequently to this, on the 12th of June, the plaintiff's attorney filed one common appearance, according to the statute, for all the three defendants, and signed three separate interlocutory judgments for want of a plea. This, he contended, was irregular, inasmuch as the plaintiff could not enter one common appearance after having delivered three separate declarations *de bene esse*.

Maule showed cause in the first instance. If the defendants might have appeared jointly, and put in the same bail, the plaintiff, under the statute, may enter one joint appearance for all three. And they clearly might so have done, for till the declaration of the plaintiff they cannot tell whether he means to declare jointly against all or not.

ABBOTT, C. J. This rule must be absolute. It is unnecessary to say whether a joint appearance before declaration delivered would be irregular or not. But after separate declarations it clearly would be so. This case is *a fortiori*; for here the plaintiff, after delivering separate declarations, has himself entered a joint appearance.

Rule absolute.

Campbell then applied for the rule to be absolute, with costs, but as it appeared, that in the notice of motion given to the plaintiff's attorney, it was stated that application would be made to set aside the writ, and all subsequent proceedings for irregularity, the Court refused the costs. inasmuch as it clearly appeared that the writ was regular.

The KING v. JAMES.—p. 894.

A commitment for a contempt, being a commitment for punishment, must be for a time certain, and consequently a commitment for a contempt till the defendant is discharged by due course of law, is bad.

Campbell, on a former day, moved for a writ of habeas corpus to the keeper of the jail for the county of Caermarthen, to bring up the body of the defendant, on the ground that he had been illegally committed, by two justices of the peace, for contempt, under the following warrant of two justices: "Receive into your custody the body of Thomas James, sent by us, and charged by us, upon view for insulting behaviour towards us, by telling us that we were biassed and prejudiced in our conduct towards him as magistrates, in the due execution of our office as magistrates of the county of Caermarthen, and keep him in custody until he shall be discharged by due course of law." He contended, first, that justices of the peace, not sitting in a court of sessions, had no power to commit for a contempt; and, secondly, upon the facts disclosed in his affidavit, that the defendant had not been guilty of any contempt for which he could lawfully be committed. In addition to these objections, there was a third which appeared upon the face of the warrant. For, at all events, as this was a commitment for punishment, it ought to have been for a time certain, and as there was no course of law by which the defendant could be discharged, such a commitment, if valid, amounted to perpetual imprisonment.

ABBOTT, C. J. Without giving any opinion upon the power of a justice of peace to commit for a contempt, this warrant appears to us to be bad, for not committing for a time certain. Take the writ.

The defendant being now brought up, under the habeas corpus, *Campbell* moved that he might be discharged.

Taunton appeared for the magistrates, and stated, that he had affidavits of the facts of the case, to show the nature of the contempt, and that he meant to contend, that the magistrates were justified in committing for a contempt.

ABBOTT, C. J. Supposing a contempt to have been committed, and the magistrates to have had power to commit for the contempt, can you contend that a commitment in this form is valid?

Taunton admitted that he could not support the validity of the warrant.

Defendant discharged.*

* See 2 Hawk. P. C. c. 1, s. 16; *Rex v. Darby*, 3 Mod. 139; *Regina v. Wrightson*, Selk. 698; *Rex v. Revel*, Strange, 420; *Petit v. Addington*, Peake, N. P. C. 62; *Mayhew v. Locke*, 7 Taunt. 63; *Bushel's case*, Vaughan, 138; *Rex v. Clement*, 4 B. & A. 218.

WILLIAMS v. PRATT.—p. 896.

Where a plaintiff had been nonsuited at nisi prius on the ground of a trifling variance between the contract set out, and that proved, the Court granted a new trial with leave to amend the declaration, generally on payment of costs, with liberty to the defendant to plead *de novo* or demur.

IN this case, which was tried at the Middlesex sittings after last Hilary term, the plaintiff was nonsuited on the ground of a variance. The declaration recited, that plaintiff was possessed of a certain memorandum or articles of agreement, &c., and also of certain fixtures, and then set out as the agreement between the parties, that the plaintiff should sell to the defendant the first mentioned memorandum, and the following fixtures, &c., and that the plaintiff would relinquish and give up to the defendant the said first-mentioned memorandum or articles of agreement on the 11th day of August, 1821. At the trial, the agreement produced in support of this was as follows: "Memorandum, &c. David Williams agrees to sell to John Pratt the following articles, viz. An agreement, &c., also the following fixtures, &c. The above D. W. agrees to relinquish and give up to J. P. the aforementioned articles on the 11th of August, 1821." At the trial, the Lord Chief Justice was of opinion, that the word "articles," in the latter part of the agreement, meant to include, not merely the articles of agreement, but the fixtures also. And on *Scarlett's* applying to set aside this nonsuit, the Court were clearly of the same opinion. But they granted him a rule nisi for a new trial, with leave to amend his declaration on payment of costs.

Gurney and *Lawes* showed cause. They referred to *Hoar v. Mill*, 4 M. & S. 470, where the plaintiff was nonsuited on a very unimportant variance between "storehouse" and "storehouses." And yet the Court afterwards refused a similar application to the present.* At any rate, the amendment should be confined to this particular error, or otherwise the plaintiff will be at liberty to remodel his declaration altogether.

Scarlett and *Reader*, *contra*. Amendments of this sort have lately been allowed by the Court. And they referred to *Halhead v. Abrahams*, 3 Taunt. 81, where a similar application was allowed by the Court of Common Pleas. And as this is on payment of costs, the Court will grant leave to amend generally.

Per Curiam. This rule must be absolute upon payment of costs. The plaintiff should be at liberty to amend his declaration generally, and the defendant may then either plead *de novo* or demur to the declaration, according as he may be advised.

Rule absolute accordingly.

* This does not appear by the report, but it was certified to the Court by Gaselee, of counsel in that cause.

LUXMORE, Gent., one, &c., v. LETHBRIDGE, Gent., one, &c.,
p. 898.

Charges for holding the courts-leet of a manor by the steward, are charges for business connected with his professional character as an attorney, and therefore are like conveyancing charges taxable, when found in a bill containing other taxable items.

THIS was an action brought by the plaintiff, an attorney of this court. The bill of particulars delivered, stated the cause of action to be; 1st, a bill for paying fees; 2d, bills of costs in several actions of ejectment; 3d, a bill of fees and disbursements for holding the courts-leet of the manor of Paris Garden, in the county of Surrey, of which the plaintiff was the steward. On a summons being taken out, BAYLEY, J., ordered the two first items to be taxed, but declined making any order as to the last. A rule nisi was obtained by *Coleridge* for referring the last bill of costs to the master to be taxed, the defendant undertaking to pay what was due, if anything. In the affidavits in answer, it was sworn that former bills for holding the courts had been previously paid containing similar charges. As to this the defendant stated, that these had been paid in ignorance.

Patteson showed cause. Here, the bill is not taxable. It is true, the bill of particulars contains some taxable items. But that does not make the whole taxable, it only makes the other items, if legal charges, and connected with his professional character, taxable: as for instance, conveyancing charges, *Mowbray v. Fleming*, 11 East, 285. Here, the charges are not of this description, they are only for work and labour, and money expended on behalf of the defendant, and they consist partly of disbursements by the steward, and partly of his necessary expenses, and there are no fees or allowances to the steward for granting leases, &c. This, therefore, was not business connected with his professional character as an attorney.

Coleridge, contra, was stopped by the Court.

Per Curiam. We think this was business done by the plaintiff in his professional character as an attorney. The office of a steward of a manor is one usually so filled, and requires legal knowledge. These charges must therefore be subject to taxation under the circumstances of this case.

Rule absolute.*

* See *In re Aitken*, 4 B. & A. 49. *Hill v. Humphreys*, 2 Bos. & Pull 845. *Marshall's case*, 2 Blacks. 912. *Ex parte C. C. Collopy*, 6 Taunt. 106, and *Sayer's Rep.* 228.

THE KING v. THE LONDON ASSURANCE COMPANY.

p. 899.

The Court will not grant a mandamus to a private trading corporation to permit a transfer of stock to be made in their books.

Puller applied to the Court for a rule nisi for a mandamus to the defendants, requiring them to permit a transfer to the assignees of Timbrell, a bankrupt, of eighty shares in the capital stock of the corporation, then standing in their books in the bankrupt's name. The affidavits stated, that a commission issued against Timbrell, who was then in partnership with two other persons, dated 8th February, 1821, under which he was declared a bankrupt, and assignees appointed. At the time he became bankrupt he held in his own right, 80 shares in the London Assurance Corporation, by virtue of which he was a director. By the charter, no person is qualified to be a director unless he has, at the time of being chosen, a given amount in their stock in his own name, in his own right, and for his own use, and not in trust for any person whomsoever; and an oath to that effect is required, and was taken by the bankrupt when he became a director. By the charter, assignments and transfers of stock must be made in a particular form therein pointed out, and no other way or method is to be used, nor can any transfer except one so made, be good or valid in law. The company had refused to permit a regular transfer of the shares into the names of the assignees to be made, and assigned two grounds: 1st, because they had received a notice from the solvent partners of the bankrupt, that the shares were joint property: and, 2dly, that the company themselves claimed a lien for a debt due to them. Upon these facts he contended that the Court should grant a mandamus for a transfer to the assignees, the legal representatives of the bankrupt, leaving the parties to establish these claims, if valid, afterwards: and he referred to *Anonymous*, 2 Str. 696, where a mandamus was granted to swear in a director of the Amicable Assurance, which is a company, like this, created by a charter from the crown. The case of *Rex v. The Mayor of London*, 2 T. R. 177, was the instance of a mandamus to restore a person to the office of the clerk of the Bridge-house estates, and in *Middleton's case*, 1 Sidf. 169, 1 Lev. 123, S. C., a mandamus was granted to restore Middleton to the treasurership of the New River Water Company. It appears, therefore, that the Court have interfered in private corporations. Here, the assignees have no remedy at law, unless the Court grant this rule, and in *Rex v. The Marquis of Stafford*, 3 T. R. 651, BULLER, J., lays it down, "that a party applying for a mandamus must make out a legal right; though, if he show such legal right, and there be also a remedy in equity, that will be no answer to the application." Here, the assignees have a legal right, as representing the bankrupt, to a transfer of these shares. In the case of *Rex v. The Bank of England*, 2 B. & A. 620, there was no legal right on the part of the applicant. That case is, therefore, distinguishable from the present.

Per Curiam. We are not aware of any instance of a mandamus

like the present having ever been granted, and if we were to grant this, we should be called upon to interfere in all cases of dispute between the members of private corporations. This company, although carried on under a royal charter, is a mere private partnership. But the writ of mandamus is a high prerogative writ, and is confined to cases of a public nature. The rule, therefore, must be refused.

Rule refused.

The KING v. The Earl of CADOGAN.—p. 902.

Where a lord of a manor is indicted for a nuisance, in not repairing the bank of a river, the Court will not compel him to allow the prosecutor, even though he is a tenant of the manor, to inspect the court rolls for the purpose of obtaining evidence in support of the prosecution.

THE defendant was indicted for a public nuisance, in not repairing, pursuant to his liability *ratione tenuræ*, a bank and wall next to the river Thames, and protecting from the river a public highway, in the parish of Chelsea. Plea, not guilty.

Chitty now moved for a rule, calling upon him, he being the lord of the manor of Chelsea, to permit the inspection of the court rolls of the court-leet and court-baron of that manor, on an affidavit from the solicitor for the prosecution, that such inspection was necessary for the prosecutor's case, and that it had been refused. And he contended that this, though in form a criminal proceeding, was really to try the right of repair, which was a civil right; and, therefore, that this fell within the ordinary principle in which the inspection of corporation books, &c., is ordered by the Court.

But the Court thought that this was a criminal proceeding, and that a party was not under such circumstances bound to furnish evidence which might ultimately criminate himself.

Rule refused.*

* It did not appear by the affidavit, but it was stated in moving the rule, in answer to a question from the Court, that the prosecutor was a tenant of the manor.

ABRAHAM v. PUGH.—p. 903.

No motion can be made to stay the proceedings in an action on a judgment pending a writ of error, until bail have been put in and perfected.

Gaselee showed cause against a rule to stay the proceedings in an action on a judgment pending a writ of error on that judgment. At the time the rule nisi was obtained, bail had not been put in and perfected, but before cause shown, that had been done. He contended, that the defendant had no right to make the motion till bail had been put in and perfected, and therefore the rule must be discharged, and cited *Smith v. Shepherd*, 5 T. R. 9, and *Bicknell v. Longstaff*, 6 T. R. 455.

Scarlett and *Chitty*, *contra*, contended that the cases were distinguishable, on the ground that here the bail had now been perfected.

Per Curiam. That is immaterial; we are to look to the state of the circumstances at the time the rule was obtained; and we think, that in order to expedite proceedings in error, it is at all events right to hold, that a party shall not be allowed to make any motion under such circumstances, until he has put in and perfected his bail.

Rule discharged with costs.

NIZETICH v. BONACICH.—p. 904.

Where a plaintiff, shortly previous to making an affidavit of debt, had written a letter, stating that the defendant was a creditor of his, the Court interfered in a summary way to discharge the defendant out of custody, on affidavits denying the debt, the plaintiff not having denied the writing of such letter by him, or alleged that the debt due to him had arisen subsequently to it.

Gurney had obtained a rule nisi for the discharge of the defendant out of the custody of the sheriff of Middlesex. It appeared that the defendant, who was a foreigner, had come over to this country to settle some affairs with the plaintiff, against whom the firm, of which the defendant was one, claimed a balance, which by the affidavits was stated to be upwards of 4000*l.*, and it appeared also, that the plaintiff, who was a prisoner in the King's Bench, had applied to the insolvent court for his discharge, and in his schedule, had represented the defendant's firm as creditors to the amount of 4000*l.* There was also a letter, dated November 2, 1821, in the plaintiff's hand-writing, in which he stated that the defendant's firm were his principal creditors. Notwithstanding these circumstances, the plaintiff had made the requisite affidavit of debt, and had caused the defendant to be arrested on a bill of Middlesex, indorsed for bail for 2000*l.* under which he was at present in custody. The affidavits *contra*, denied the facts alleged, with the exception of the letter above referred to.

Scarlett showed cause, and contended that the Court would not go into the merits of an arrest upon affidavits.

Gurney, and *R. V. Richards*, relied upon the hardship of the case, and the plaintiff's not having denied the letter, or alleged that the debt had arisen subsequently to it.

Per Curiam. Our opinion is entirely founded upon that letter, in which the plaintiff speaks of the defendant's firm as his principal creditors: now that letter he could not but have denied, unless it were genuine. We do not dispute, that in general the rule is as stated by the plaintiff's counsel, but we think this an exception. Our discharging the present defendant, will not, however, afford a precedent for many motions of the kind in future.

Rule accordingly.

Note. It being afterwards suggested that the letter, which was in Italian, did not bear the interpretation put upon it, that question was referred to the master.

WHITE v. GOMPERTZ.—p. 905.

Where a defendant being previously in custody in execution for a debt, a detainer was lodged against him, but for too large a sum, and on this being discovered in a few hours, the plaintiff discontinued on payment of costs, and before the payment of costs lodged a fresh detainer: *Held*, that this second detainer was regular, and that it was not like the case of a fresh arrest, which cannot be made till the costs have been paid.

Chitty had obtained a rule nisi for setting aside the last detainer of the defendant in this cause, and all proceedings thereon with costs. The affidavits in support of the rule stated, that on the 30th of May, a detainer was lodged against the defendant, then a prisoner in the King's Bench, for 1785*l*. And on the 31st of May, this defendant was discharged as to this detainer, and a fresh detainer lodged for 1180*l*. only. The plaintiff on the same day served a notice to discontinue the first action on payment of costs, and on 1st June, the costs were taxed and paid. The defendant was previously in custody in execution for 317*l*. at the suit of another person. The affidavits on the other side stated that it was merely a mistake, and that in a few hours after it was discovered, notice was sent to the Marshal, that the defendant was only to be detained for 1180*l*. and on the next day the discontinuance took place.

Denman showed cause, and contended that this was not the case of a new arrest, but only a correction of the former one. And here the defendant has sustained no inconvenience, for the mistake being discovered, notice of it was immediately given to the Marshal.

Chitty, contra. Here the defendant has been detained for several hours on a debt of 1785*l*., whereas he ought to have been detained for only 1180*l*.; and in order to obtain the rules, he must give security to the Marshal, which is thereby altered. He cited *Molling v. Buckholtz*, 3 M. & S. 153, which was the case of an arrest upon a fresh writ, and contended that there was no distinction between that cause and the present.

The Court were, however, of opinion, that the cases were distinguishable. Here the defendant was previously in custody. This is merely rectifying a mistake in the amount for which he was detained, which might have been done without discontinuing. And the plaintiff is not to be prejudiced by having discontinued, and thereby placed the defendant in a better situation.

Rule discharged with costs.

BLACKHURST v. BULMER.—p. 907.

Where a cause stood in the paper below the last cause mentioned in the written list affixed at the outside of the court, and was tried (being stated to be an undefended cause) the counsel for the defendant objecting to it, and declining to appear: *Held*, that the trial was regular, and the Court refused a new trial, there being no affidavit of merits.

THIS case stood No. 90, in the printed list at the sittings in term; the defendant's counsel objected to its being tried out of its turn, and declined to appear for the defendant. The written list of causes, affixed in the usual way on the outside of the court, did not extend beyond No. 26, of the printed list. The cause was, however, tried by BEST, J., on the ground stated to him, that there was no substantial defence to the action; and that there were witnesses for the plaintiff remaining in town on purpose, whose residence was in Lancashire. No affidavit of merits was now produced in support of the application.

D. F. Jones now moved for a new trial in this case, and contended that the trial was irregular. The present case goes a great deal further than *Fourdrinier v. Bradberry*, 3 B. & A. 328, for if this verdict can be supported, any cause in the printed list at whatever distance, may be taken, and a defendant applying to set aside the verdict, may be compelled to swear to merits. If this be so, the written list would have the effect of misleading instead of assisting the persons interested. Besides, if this be regular, both counsel and attorneys will be obliged to attend during the whole of the sittings *de die in diem*, and the uncertainty will also be most inconvenient both to parties and witnesses.

ABBOTT, C. J. There is no injustice in the particular case, inasmuch as the defendant does not venture now to swear to merits. Nor is there in the present instance any inconvenience, either to the counsel or the attorney for the defendant, for both were in fact present at the time of the trial, but the counsel, as a matter of policy, did not choose to appear. With respect to the general rule, it may be doubted whether the modern practice of putting up written lists has not done more harm than good; but at all events it cannot be permitted that a defendant in any case shall prevent a judge from trying a cause in the printed paper, that he may think proper, merely for the purpose of delay, or at least without showing some substantial ground either of justice or convenience.

Rule refused.

OLIVA v. JOHNSON.—p. 908.

Where a plaintiff carried on business abroad, and had no permanent residence in England, but was in England at the time of bringing the action, and it was sworn, had no intention of leaving the country: *Held*, that this was no sufficient answer to an application for security for costs, inasmuch as it was not distinctly sworn that he resided and intended to continue to reside here: *Held*, also, that it is no answer to such application, that the action is brought in pursuance of liberty reserved by the Vice-Chancellor, it not being brought by his direction.

A RULE nisi had been obtained in this case for security for costs, and staying proceedings in the mean time. The affidavits on the part of the defendants stated, that the plaintiff carried on at Quebec, in Canada, the business of an auctioneer and general merchant, having no house of trade or permanent residence in this country, and that as deponent was informed and believed, the plaintiff was a Canadian by birth, and had permanently resided at Quebec, except during his occasional visits to this country on matters connected with business. The affidavits of the plaintiff's attorney stated, that the plaintiff had resided at Liverpool for upwards of twelve months, and still resided there; and that deponent did not believe that the plaintiff had any intention of leaving the kingdom, as he had often told him (the attorney) that he had not. The affidavit further stated that the defendant had sued out a commission of bankrupt against him, which being disputed by the plaintiff, the Vice-Chancellor ordered the plaintiff's petition to stand over, with liberty to him to bring an action at law, to try the validity of the commission, and that the present action was accordingly brought for that purpose.

D. F. Jones now showed cause. The defendant is not entitled to demand security for costs. In *Porrier v. Carter*, 1 H. Bl. 106, it was held that a plaintiff is not compellable to find security for costs, on the ground of his being a foreigner, if he reside in England: and in *Maria v. Hall*, 2 Bos. & Pul. 236, the Court adopted the same rule even where the plaintiff was not voluntarily resident here, but was a prisoner of war, actually confined in prison; nor will the Court require security for costs on the ground of the plaintiff being a bankrupt, *Anonymous*, 2 Taunt. 61. Besides, it is a decisive answer to the present application, that this is an action brought in pursuance of liberty granted by the Vice-Chancellor, upon the hearing of a petition in bankruptcy, for the purpose of trying the validity of the commission. In *M'Culloch v. Robinson*, 2 New Rep. 852, the Court of Common Pleas decided, that security for costs could not be required in an action of this kind, even though the plaintiff with all his family were at the time gone to reside at New York in North America. It would be most unreasonable to stay proceedings until security given, when the defendant has taken all the plaintiff's property under the commission, and when his right to take the property is the distinct object of the action.

Parke, contra, having observed that this was an action brought not by the direction of the Vice-Chancellor, but merely in pursuance of liberty reserved, the petition being ordered to stand over in the meantime, was stopped by the Court.

Per Curiam. As to the first point, the affidavit is not sufficient: it should go further, and state that the plaintiff has been, and is now a resident in this country, and that he intends to continue to reside here. As to the second point, the case of an action brought by the direction of the Vice-Chancellor, differs widely from that of an action brought merely in pursuance of leave or liberty reserved. If this had been a case of the former kind, it would have been distinctly within the authority of *M'Culloch* and *Robinson*. But as it is, the plaintiff may apply to the Vice-Chancellor for his directions, as to security for costs being or not being required: we cannot take this case out of the general rule.

Rule absolute.

MEASURE v. GEE.—p. 910.

A testator devised certain estates to his daughter for life, and after her decease to her son A. B. an infant, for life, and after the determination of that estate by forfeiture or otherwise to trustees, to preserve contingent remainders, but to permit A. B. to receive the profits during his life, and after the decease of A. B., then to the heirs of his body for ever, with a devise over in case of failure of his issue: *Held*, that A. B. took an estate tail in remainder.

THE following case was sent by the Vice-Chancellor for the opinion of this Court.

On the 3d May, 1792, John Hardy made his will, duly executed to pass freehold estates, and in the will were the following clauses. And as to my real and personal estate, I give and devise the same in manner following, (that is to say,) "First, I give and devise unto my grand-daughter, Ann Alcock, and to her heirs and assigns for ever, all those my arable, meadow, or pasture lands, hereditaments and premises; situate, lying, and being, in Leverington, in the isle of Ely, in the county of Cambridge, which I purchased of the trustees of Mr. Daniel Swaime, but in case it shall happen, that my said grand-daughter, Ann Alcock, shall depart this life unmarried, and without issue of her body lawfully to be begotten, then I give and devise the said arable, meadow, or pasture lands, hereditaments, and premises unto my daughter Ann, the wife of William Tatam, her heirs and assigns for ever. Also I devise unto my said daughter, Ann Tatam, all the residue and remainder of all my freehold and copyhold messuages, lands, &c. and with their and every of their rights and appurtenances, the copyhold part thereof I have duly surrendered to the use of this my last will, to hold the said freehold and copyhold messuages, lands, &c. with their appurtenances, unto my daughter, Ann Tatam, for the term of her natural life; and after her decease, then I give the said messuages, lands, &c. with their appurtenances, unto John Tatam, an infant, the only son of my daughter, Ann Tatam, for the term of his natural life; and after the determina-

tion of that estate by forfeiture or otherwise, then I give and devise the said messuages, lands, &c. with their appurtenances, unto Henry Boulton and James Measure, and their heirs, during the life of the said John Tatam, upon trust to preserve the contingent uses and estates, hereinafter limited and devised, from being defeated and destroyed, and for that purpose, to make entries or bring actions, as the case shall require; but nevertheless, to permit the said John Tatam, and his assigns, during the term of his natural life, to receive and take the rents and profits thereof, for his and their own use; and from and after the decease of the said John Tatam, then I devise the said messuages, lands, &c. with their appurtenances, unto the heirs of the body of the said John Tatam, lawfully to be begotten, his, her, and their heirs, and assigns, for ever; but in case it shall happen, that there shall be failure of issue of the body of the said John Tatam lawfully to be begotten, then there was a devise over to the two daughters of Ann Tatam." The question for the opinion of this Court was, whether John Tatam, the son, took an estate tail in remainder in the estate and premises in question, under and by virtue of the will of John Hardy. The case was argued at the sittings before last Michaelmas term, by

Preston, for the plaintiff. By the settled rules of law John Tatam took an estate tail under this will. It is a general rule, that when an estate is limited to one for life, a subsequent limitation to the heirs of the body of that person creates an estate tail in the donee for life. This is laid down in Mr. Fearn's Essay on Contingent Remainders, p. 161, 6th edition, where all the authorities on the subject are collected. The rule in *Shelley's case* imposes this effect on the several gifts. *Morris v. Ward*, 8 Term Rep. 518, *Troughton v. Langley*, 2 Ld. Raym. 873, *Goodright v. Pullyn*, 2 Ld. Raym. 1437, and *Coulson v. Coulson*, 2 Atk. 247, are the more relevant authorities. In the last case the devise was to Robert Coulson for life; remainder to trustees during his life, to preserve contingent remainders; remainder to the heirs of the body of Robert Coulson. It was held, that by the devise to the heirs of his body, he took an estate tail; and the authority of that case was confirmed by the decision in *Hodgson v. Ambrose*, Dougl. 387. But the case of *Goodright v. Pullyn*, 2 Ld. Raym. 1437, is the authority more immediately applicable. The language of the Court there is full, clear, and precise in favour of the plaintiff, and shows that these limitations created an estate tail. In that case, and also in *Shelley's case*, 1 Rep. 93, from which the general rule derives its denomination, there were words of superadded limitation; and whether the second gift be to heirs males of the body and their heirs males of their bodies, or their heirs of their bodies, or their heirs, does not prevent the application of the rule. These words of superadded limitation will convert the words "heirs or heirs males of the body," into words of purchase or designation. In all these cases the words of superadded limitation were rejected, as far as they did not quadrate with the intention of creating an estate tail, by means of the words "heirs or heirs male of the body." So in this case, the words "his, her, and their heirs for ever," must be discarded. The words of limitation

over establish the general intention, that John Tatam was to be the stock of the family and the donee in tail. In order to convert the words "heirs of the body" into words of designation, giving interests by purchase, it would be incumbent on the defendant to show that these terms were used in the sense of "children." No such intention can be collected from this will, and that construction would, in this case, defeat, not advance the intention. It would be very inconvenient, independently of disturbing settled rules, to treat two or more children as joint-tenants in fee; and yet that is the only construction which the defendant can aim to establish.

Sugden, contra. The law is not now as laid down by Mr. Fearne. The case of *Coulson v. Coulson* came under the consideration of the Court in *Hodgson v. Ambrose*, and the Court adhered to it only because it has stood as law for so many years. The old rule, however, is broken in upon by several decisions. In *Doe v. Perryn*, 3 Term Rep. 484, the estate was devised to A., the wife of B., for life, remainder to trustees to preserve contingent remainders, remainder to the children of A. and B. and their heirs for ever, to be divided among them equally, and if one child, to such only child, and his or her heirs for ever, and for default of such issue, remainder over. At the death of the deviser, A. and B. had no child. It was held, that the estate limited to their children was a contingent remainder in fee, which, on the birth of a child, vested in that child, subject to open and let in those that might be born afterwards, and that the remainders over would be defeated by that estate becoming vested, and that the words "for default of such issue" in such a case, meant "for default of such children." In *Gretton v. Haward*, 6 Taunt. 94, the devise was to the testator's wife, of all his real estate, she first paying his debts and funeral expenses, and after her decease to the heirs of her body, share and share alike, if more than one; and in default of such issue to be begotten by testator, to be at her own disposal. There being children of the testator and his wife, it was held, that the wife took only an estate for life, with remainder to the children, as tenants in common in fee. In *Doe v. Goff*, 11 East, 668, the testator devised an estate to his wife for life, and after her decease to his daughter Mary, and to the heirs of her body, to be begotten, as tenants in common, and not as joint-tenants; but if such issue should die before she or they attained 21, then to his son Joseph, in fee; and then he devised another estate to his wife for life, remainder to his son Joseph, and the heirs of his body, begotten or to be begotten; but if he died without issue, or such issue all died before he or they attained 21, then to his daughter Mary, and the heirs of her body, begotten or to be begotten, such issue, if more than one, or take as tenants in common. It was held, that the daughter Mary took only an estate for life in the first estate, with remainder to all her children equally as purchasers. In *Merest v. James*, 1 Brod. & B. 484, there was a devise of freehold and copyhold lands to trustees, for the use of the testator's daughter for life, and after her decease, then to the use of the issue of her body, lawfully begotten; and in default of such issue, or in case none of such issue lived to attain the age of

21 years, then as to the lands at H., over to the devisor's brother S. for life, and after his decease to the use of the issue of his body, or in default of such issue, or in case none of such issue lived to attain 21 years, then to devisor's brother H. for life, and after his decease, to the issue of his body, lawfully begotten, and in default of issue, then to devisor's sister E., her heirs and assigns for ever; and as to the lands of W., upon the death of his daughter without issue, or if issue, they should not live to attain 21 years, to his brother H., his heirs and assigns; and after the death of his daughter, without issue as aforesaid, all the messuage at S. to his sister E., her heirs and assigns: It was held, that the daughter took an estate for life in the premises. This decision must have proceeded on the ground, that, upon the whole, the testator, by the word *issue*, meant *children*. Now, here the case differs from *Hodgson v. Ambrose*, for not only is there a limitation to preserve contingent remainders, but there are superadded words of limitation to the gift to the heirs of the body. The case, therefore, falls within the later authorities which I have cited.

ABBOTT, C. J. In all the cases cited by the defendant's counsel, a manifest intent appeared on the face of the will, that the children should take different interests from estates tail. We will, however, consider the case, and send our certificate.

The following certificate was sent:

This case has been argued before us, and we are of opinion, that John Tatam, the son, took an estate tail in remainder in the premises named.

C. ABBOTT,
G. S. HOLROYD,
W. D. BEST.

LOWE v. Sir WILLIAM MANNERS, Bart.—p. 917.

R. Lowe, by will, devised all his landed estates to trustees, and bequeathed 10,000*l.* as a portion to his daughter, C. L., but in case she should marry any one of his three kinsmen named in the will, he gave to whichever of them she married certain estates therein specified, he taking the name of Lowe, and settling upon her an annuity of 1000*l.* a year during her life, and in case that circumstance did not take place with his daughter, C. L., he then directed that it might be offered to his other daughter, A. L., in every particular; and in case neither daughter should marry in the manner above mentioned, then he directed that his daughters should have 10,000*l.* each, and, in that case, he gave all his estates to W. D., his kinsman, for ever, on his and his heirs taking the name of Lowe irrevocably. After the date of this will C. L. married one W. H., who was not one of the persons named in the will who would have become entitled to the estate after she married him, and the testator paid her a marriage portion; and afterwards by a codicil to his will reciting her marriage, and that he had given her a fortune, he revoked all devises and bequests in her favour contained in his original will, and also all claim which her husband W. H. might have to any of his real and personal estates by virtue of his marriage with his daughter C. L., and by virtue of his said will, and in lieu thereof he bequeathed unto each of their children a pecuniary legacy, and he then directed that in case his other daughter should marry either of the persons mentioned in his will, then upon condition that either of those persons whom she married, or his heirs, would accept, take, and use the name of Lowe only, he gave all his real and personal estate unto such of those persons whom she married, and his heirs; and in case his daughter, A. L., should not marry either of the persons mentioned in his will, or if

she married one of them, and he refused to accept, take, or use the name of Lowe, in that case he revoked all his devises and beques^s contained in his will and codicil in her favour, and in lieu thereof bequeathed her 10,000*l*. The testator died soon after the date of his codicil, and his daughter, A. L., afterwards married T. F., who was not one of the persons named in the will who would have been entitled to the estate in the event of her having married him, and upon that occasion the 10,000*l*. was paid to her, and W. D. then entered upon the testator's estates, and took upon himself the name of Lowe, and suffered a recovery: *Held*, that W. D. was seized of an undefeasible estate in fee simple in the estate in question.

THE Vice-Chancellor sent the following case for the opinion of this Court. Richard Lowe being seized in fee simple of an undivided moiety of the North-Witham Wood, and of several closes in North-Witham and elsewhere in the county of Lincoln, and of other freehold estates, duly made and published his last will in writing, bearing date the 5th day of February, 1781, and duly executed and attested, so as to pass freehold estates, and amongst other things devised as follows: "I give all my landed estates in the different counties of Derby, Bedford, Lincoln, Wilts, and Middlesex, to my three friends, E. Mills Mundy, Robert Williams, and Kempe Brydges, for the uses thereafter intioned, appointing them executors of this my last will. 10,000*l*. I give as a portion to my daughter Charlotte Layton, otherwise Charlotte Lowe, 5000*l*. of which to be paid on the day of her marriage, and 5000*l*. in one year after, on condition she marries with the consent of any two of my aforesaid executors to a man of character and fortune, sufficiently unincumbered to make a proper settlement upon her; but in case she should marry with her own consent any one of my three kinsmen, William, Thomas, or John Drury, her choice beginning with the eldest, then Thomas, and then John, my will is, that if any one of them takes place, which ever of them she chooses, I give him all the Denby and Locke estates on taking the name of Lowe, and settling one annuity or rent-charge of 1000*l*. a year during her life; and in case the aforesaid circumstance should not take place with my daughter Charlotte, I then will that it may be offered to my daughter Ann Layton, otherwise Lowe, in every particular. And I charge the aforesaid estates in Bedfordshire, Lincoln, and Wilts, with the aforesaid sum of 10,000*l*. on the special conditions aforesaid, to either of them that shall not marry as aforesaid. And should neither of the above marriages take place, I will that any one of the sons of my executors, Edward Mills Mundy, and a liking should take place, that on their taking the name of Lowe, and making the same settlement, the estates shall be theirs and their heirs male for ever. I will that the income of my fortune shall be the property of the person who marries either of my aforesaid daughters, and his heirs, for ever, taking the name of Lowe, and that the entail be continued on all my fortune not to be disposed of or mortgaged, but for the sole use of the income only to the name of Lowe for ever; and should it so happen that neither of my aforesaid daughters should marry in the manner I have mentioned, or to some worthy, good man, of an estate in fee of not less than 500*l*. in land or real property, unincumbered of 10,000*l*., I will that my said daughters have 1*r*,000*l*. each, to be paid by my executors at such time

as they or any two of them think proper. And then I give all my estates, both landed and personal, to my kinsman William Drury, and his heirs male for ever, on his and his heirs taking the name of Lowe irrevocably." After the date of the will, Charlotte Layton, otherwise Lowe, married William Heath, and upon that occasion, Richard Lowe paid her a marriage portion. Richard Lowe afterwards made and published a codicil in writing to his will, bearing date the 25th day of May, 1785, part whereof was in the words following: "This is a codicil to the last will and testament of me, Richard Lowe, Esq., and to be taken as part thereof. Whereas, in and by my last will and testament, bearing date the 5th day of February, 1781, I have appointed Edward Miller Mundy, Robert Williams, and Kempe Brydges, my trustees and executors. Now I hereby revoke that appointment; and I hereby appoint the said Edward Miller Mundy, together with John Radford and Evan Lewis, executors of my last will. And I devise and bequeath unto them and their heirs, all my real and personal estates, to hold to them and their heirs to the use of such person, and upon such events, and under such conditions, and subject to such charges as are mentioned and declared in and by my said last will and testament. And, whereas, since the making of my said will, one of my daughters, Charlotte Lowe, otherwise Layton, hath intermarried with William Heath, Esq., on which marriage I gave my said daughter a fortune, therefore I do hereby revoke and make void all the devises and bequests contained in my said will for the benefit of my said daughter, Charlotte Heath. And I do hereby also revoke and make void all claim and right which the said William Heath might have to any of my real and personal estates by virtue of his marriage with my said daughter, Charlotte Heath, and under and by virtue of any devise or clause in my said will, or any construction thereof, and in lieu thereof, I give and bequeath unto each of the children of the said William Heath, to be begotten on the body of my said daughter, (except an eldest or only son,) the sum of 2000*l.*, to be paid to such of them as shall be a son or sons at the age of 21 years, and to such of them as shall be a daughter or daughters at the age of 21 years, or day of marriage, which shall first happen. And I hereby charge my real estates with the payment thereof. And in case my other daughter, Ann Lowe, otherwise Layton, should marry either of the gentlemen, and in the manner mentioned in my said will, then upon this express condition, that either of those gentlemen whom she may so marry, and his heirs, will accept, take, and use the name of Lowe only, I give all my real and personal estates, subject to my debts, funeral expenses, and legacies, and also subject to a rent charge of 1000*l.* per annum to my said daughter, Ann Lowe, otherwise Layton, for her life, and independent of her husband, unto such of those gentlemen whom she may so marry, and his heirs. And in case my said daughter, Ann Lowe, otherwise Layton, shall not choose to marry either of those gentlemen whom I have mentioned in my will for that purpose, or if she does marry one of them, and he should refuse to accept, take, and use the name of Lowe, in such case I hereby revoke all devises and bequests contained in my said will and this my codicil to my said daughter Ann, and in lieu thereof I give

and devise unto her 10,000*l.*, to be paid to her at the age of 21 years, or day of marriage, which should first happen. And I hereby charge my real and personal estates with the payment of the said 10,000*l.* and the interest thereof as aforesaid, and in all respects subject and conformable to this my codicil, I do confirm my last will and testament." Soon after the date of the codicil Richard Lowe died, and in the year 1789, Ann Layton, otherwise Lowe, married the honorable Thomas Fane, who at the time of the marriage, had not an estate in fee of not less than 500*l.* in land or real property, unincumbered of 10,000*l.* And upon the occasion of that marriage, the portion of 10,000*l.* given to her by the codicil of Richard Lowe, was paid to her out of his personal estate; and William Drury entered into the possession of the testator's undivided moiety of the said wood and woodlands and closes, in the county of Lincoln, and of his other freehold estates, and took upon himself the name of Lowe in addition to the name of William Drury. In Michaelmas term, 1790, William Drury Lowe duly suffered a common recovery with double voucher of the said undivided moiety of the said wood, woodlands and closes, which recovery was declared to enure to the use of William Drury Lowe, his heirs and assigns. William and Charlotte Heath, and Thomas and Ann Fane, and William, Thomas and John Drury, and several sons of Edward Miller Mundy are now living. The plaintiff, W. D. Lowe, contracted to sell the undivided moiety of the said wood, woodlands and closes, to the defendant, Sir William Manners, and filed his bill in the High Court of Chancery, against the defendant for a specific performance of the contract.

The question directed by the Vice-Chancellor for the opinion of this Court was, whether the plaintiff was now seized of an indefeasible estate in fee simple, or of any, and what other estate in the undivided moiety of the lands and hereditaments in question. The case was argued at the sittings before last Michaelmas term.

Sugden, for the plaintiff. The question is, whether the marriage which has taken place, operates as a cesser of the power to marry any of the persons designated in the will; or, whether the daughter may not take the estate hereafter by marrying one of those persons. It was the intention of the testator, that the daughter should at once make her election; and having once married a person not of the favoured class, she was to lose the estate. The daughter was to have a different interest under the will according to the person she married. She had an election given her, to marry one of the Drurys, and in that event her husband was to have the Denby and Locke estates on taking the name of Lowe, and settling on her an annuity of 1000*l.* But if she married a person not of the favoured class, then she was to have a fortune of 10,000*l.* By the codicil, the testator revokes the devise to one of his daughters, she having married a person not of the favoured class and states that he had given her 10,000*l.*: and he then tenders to the other daughter, the option of marrying one of the favoured class, in which case her husband, after settling 1000*l.* per annum on her, is to have the estate on taking the name of Lowe. Then comes the clause

which is decisive of the question in the cause. "And in case my said daughter shall not choose to marry either of the gentlemen whom I have named in my will for that purpose: or, if she marry one of them, and he should refuse to accept, take, and use the name of Lowe, then, and in such case, I revoke all devises and bequests contained in my will and codicil to my said daughter, and in lieu thereof, give her 10,000*l.* to be paid to her at 21 years of age or day of marriage, and until payment to bear interest." From the day of marriage, she was to be entitled to the fortune substituted in lieu of the estate to which her husband, if of the favoured class, would have been entitled. It is quite clear, that by the very act of marrying one not of the favoured class, she was to lose absolutely, all claim to the estate. The choice is only once tendered to her. Even if she did marry one of the favoured class, and he did not use the name of Lowe, the gift was revoked; and if she married any person not of the favoured class, the gift was also revoked. In *Hutcheson v. Hammond*, 8 Bro. Ch. Ca. 128, the testatrix gave her husband a power of appointing 3500*l.*, in case Ann Jones should, during his life, marry without his consent. Ann Jones having married once with her father's consent, it was held that his power of appointment was gone.

Preston, contra. The codicil cannot have any influence on the construction of the gifts in the will. If the will has not given effectually, the codicil does not supply the defect. The first question is, whether the estate ever vested. The second, whether the gift was consistent with the rules of law respecting perpetuities. Ann might have married before Charlotte lost her election. The will does not impose on Ann the obligation of marrying during the lifetime of Charlotte. In that case, during the whole period of Charlotte's life, the estate would not have vested in Mr. Drury. There is a material distinction between conditions which are to create an estate, and conditions which are to destroy or defeat an estate. The former are to be performed by construction of law as near to the words of the condition as may be, and according to the intent and meaning of the condition; and if the intention of the condition cannot be performed according to its terms, the gift will fail; but conditions that destroy an estate are to be taken strictly. In *Randal v. Payne*, 1 Bro. Ch. Ca. 55, the testator gave to trustees 4000*l.*, for the use of Jane Wood, if she should marry with consent of the trustees, if not, then only 1000*l.*; also to the same trustees 4000*l.*, to the use of Martha Wood, if she should marry with their consent, if not, only 1000*l.*; and if either of these girls should marry into certain families named, and have a son, the testator gave his estate to that son for life, with remainder over; if they should not marry, then the estate to Randal for life, and her son, in fee. A bill was filed, and there was a decree that the money should be invested in the funds till the event should happen. Jane Wood married with consent, but not into the favoured families; Randal filed a bill for the residue, as forfeited to him; but the Lord Chancellor said, "till they married nothing could vest, for marriage was a condition precedent, then could anything vest till the whole contingency became impossible?"

That suspends it during their lives. You suppose if they once married, they had lost all chance of marrying a Rivington or Gosling; if he had said so it would have been very well. Suppose the girls had married against consent, one of the husbands had died, and she had married into one of the favoured families, and had a son, and that son was here claiming the estate, the Court would not incline to refuse him.' The bill was dismissed. Now that case is expressly in point. It is said that Drury takes the estate the instant the girls marry a person not of the favoured class. It is clear that no estate could vest in Drury until they both married. Did it then ever vest? Suppose one of the daughters married a person of the favoured class, and he refused to take the name of Lowe, the estate would not, on the marriage, vest in him; but he might take the name at any time during his life, and the estate would vest in him when he took the name. There is no reason, therefore, why the other part of the condition may not be performed at any time, during the life of the daughters. Secondly, this gift to Mr. Drury is void, because it has a tendency to a perpetuity; for it will not necessarily vest within 21 years after a life in being at the death of the testator. The gift is to a person not necessarily in esse; for the daughter may, 40 years after the death of the testator, marry a youth only 18 years of age, and who, consequently, was not in esse at the time of the testator's death. The gift is not to the daughters, but to the persons whom they may marry, with a limitation over to W. Drury, on failure of effect of the former gift. *Proctor v. The Bishop of Bath and Wells*, 2 H. Bl. 358, *Gee v. Audley*, 1 Cox Rep. 324, *Leake v. Robinson*, 2 Merivale, 363, are authorities upon this point. This is a gift upon a contingency, and it might have been suspended beyond a life in being, or 21 years, and was, therefore, void. The gift to the husband was open to this objection. It follows, that the alternate or substituted gift to Mr. Drury must be liable to the same objection.

The following certificate was afterwards sent:

This case has been argued before us; and we are of opinion, that the plaintiff is now seized of an indefeasible estate in fee simple, in the undivided moiety of the lands in question.

C. ABBOTT,
J. BAYLEY,
W. D. BEST.

THE KING v. HARRIS.—p. 926.

An information for perjury, stated that the defendant, before a committee of the House of Commons, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear and give in evidence, &c. It then set out the evidence so given. The count then averred, that the defendant at the bar of the House of Lords, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c. It then set out his evidence, which was directly contrary to that given before the House of Commons, and concluded (after averments as to the identity of the persons and places referred to in the evidence on both occasions;) and so the jurors aforesaid do say that the said E. H. did commit wilful and corrupt perjury: *Held*, on motion in arrest of judgment, that this count was bad.

INFORMATION by the Attorney-General against the defendant for wilful and corrupt perjury. The first count stated, that heretofore, and before the committing the offence after mentioned, to wit, at a session of parliament holden on, &c. at Westminster, in the county of M., to wit, at the parish of Saint Margaret, within the liberty of Westminster, in the county of M., a certain bill, entitled, "An act," &c., was pending before the Lords Spiritual and Temporal, which said bill recited, that there was the most notorious bribery and corruption at the then last election for the borough of Barnstaple, in the county of D., and that such bribery and corruption was likely to continue and he practised in the said borough in future, unless some means were taken to prevent the same; and by which bill certain matters and things were proposed to be enacted, touching the election, to be thereafter had for burgesses to serve in parliament for the said borough; and that such proceedings were had upon the said bill in the said parliament before the said Lords Spiritual and Temporal, that afterwards, and during the said session of parliament, and before the committing, &c., to wit, on, &c., at, &c. It was ordered by the said Lords Spiritual and Temporal, amongst other things, that counsel should be at liberty to examine witnesses in support of the said bill. The count then stated that the defendant, late of, &c., afterwards, to wit, on, &c., at, &c., did appear before the Lords Spiritual and Temporal, that is to say, at the bar of the said Lords Spiritual and Temporal, as a witness in support of the said bill, and that he was then and there sworn, &c., before the said Lords, &c., the said Lords, &c., having sufficient and competent power, &c. And that upon hearing the evidence before the said Lords, &c., in support of the said bill, certain questions then and there arose and became and were material, that is to say, &c. The count then set out the questions, and the defendant's evidence before the House of Lords, and concluded by assigning the perjury as to each particular in the usual way. The second and third counts were similar in form to the first, differing only in the assignments of the perjury. The fourth count stated, that heretofore, to wit, on, &c., in the Lower House of parliament of the said late king, then held at Westminster, to wit, at the parish of, &c., E. H. Esq., commonly called Lord Viscount Clive, J. M. Esq., &c., then being members of the Lower House of parliament, were in due manner, according to the form of the statutes in such case made and provided, chosen, nominated, and sworn to be a select committee

to try and determine the merits of an election of two burgesses to serve in the said parliament, &c., as burgesses for the borough of B., in the county of D., and as of the return of, &c., as burgesses, &c. And that the persons so chosen, &c., afterwards, to wit, on, &c., at a certain place adjacent to the House of Commons, to wit, at, &c., did in due manner meet to try and determine the merits, &c. And that the defendant afterwards, to wit, on, &c., at, &c., did appear as a witness, touching the merits, &c., before the said persons so chosen, &c. The count then stated his being duly sworn, and that he, being so sworn, deliberately and knowingly, and of his own act and consent, did say, swear and give in evidence, &c." It then, after setting out his evidence before the committee of the House of Commons, proceeded to state, that heretofore, and before the committing, &c., to wit, at a session of parliament, holden on, &c., a certain bill, entitled, &c., was pending before the Lords Spiritual and Temporal, &c.; and then, after stating, as in the first count, that the defendant was a voter of the borough of B., and the election, and the different persons named in the defendant's evidence before the House of Commons, and the borough of B., &c., named in his evidence before the House of Lords, were of the same borough of B., &c., and not other and different. And then concluded: "And so the said Attorney-General says, that the said Edward Harris, to wit, at, &c., in manner and form aforesaid, did commit wilful and corrupt perjury to the great displeasure, &c." The fifth count varied from the fourth only in the statements of the evidence, which were different. The sixth and seventh counts were similar to the fourth and fifth, but added, that the questions in answer to which the respective evidence of the defendant before the Houses of Lords and Commons was given, were material questions. Plea, not guilty. At the trial at the Westminster sittings after last Michaelmas term before ABBOTT, C. J., the jury acquitted the defendant upon the first three, and found him guilty upon the last four counts of the information. A rule nisi was obtained in last Hilary term for arresting the judgment, on the ground that these counts were insufficient.*

* The case of *Ree v. Knill*, which was precisely similar to the present, and growing out of the same transaction, and in which the indictment was in the same form, was tried on the same day; and the jury convicted the defendant on those counts which charged the perjury specifically to have been in the examination before the House of Lords. No evidence was given, except simply the proof of the contradictory oaths of the defendants on the two occasions. In that case *D. F. Jones* moved for a rule to show cause why there should not be a new trial, on the ground that in perjury two witnesses were necessary, whereas in that case only one witness was adduced to prove the corpus delicti, namely, the witness who deposed to the contradictory evidence given by the defendant before the committee of the House of Commons; and he contended that if this evidence were of itself sufficient, the danger intended to be provided against by the rule requiring two witnesses would be immediately let in, for one false witness would only have to swear to the fact of a contradictory statement upon oath by the defendant, and that would suffice without the confirmation of any second witness. Secondly, he insisted that mere proof of a contradictory statement by the defendant on another occasion was not sufficient without other circumstances, showing a corrupt motive, and negating the probability of any mistake. But the Court held, that the evidence was sufficient, the contradiction being by the party himself, and that the jury might infer the motive from the circumstances; and they refused a rule nisi for a new trial.

The *Solicitor-General*, *Raine*, *Gurney*, *Littledale*, and *Shepherd*, showed cause. These counts are good. It appears on the face of the record that the defendant has deliberately and knowingly sworn, first, before the House of Commons, and secondly, before the House of Lords; and on these occasions has made contradictory statements. It is, therefore, quite certain that the defendant must have committed perjury. No other mode can be devised of making the charge, and if this be not sufficient, the defendant cannot be punished. It is said that the Court cannot see on which of the two occasions the perjury was committed. But as both the tribunals were competent to administer the oath, that is not material. It is also put as a difficulty, that, supposing the oaths were in different counties, it would be impossible to say in which the party should be tried; but that difficulty does not exist here, for both the oaths are in the same county. [BAYLEY, J. Suppose by act of parliament all perjuries committed before the 1st January are pardoned, and on an indictment like this it appeared that of the two contradictory depositions one was before and the other after that day: would the pardon extend to such a case?] It may be sufficient to say, in answer to this and the like objections, that in this case they do not exist; and, perhaps, in cases where they did exist, this form of indictment could not be adopted. In *Rex v. Thorogood*, 8 Mod. 179, it was held in the Common Pleas, that where a man confessed an affidavit made by him to be false, that Court might under 5 Eliz. c. 9, s. 9, order him to be pilloried for perjury committed in the face of the Court. Yet there, as here, it would be impossible to say on which of the two occasions the perjury was committed. There are precedents of indictments in this form, one of which is to be found in a note-book of CHAMBRE, J. And YATES, J., convicted a person at the Lancaster assizes, 1764, on an indictment in this form, supported by similar evidence as in this case, which conviction was afterwards approved by Lord MANSFIELD, C. J., and WILMOT and ASTON, Js., to whom he mentioned the case. And there was another case at the York assizes, where a similar verdict was given, on an indictment containing a charge like the present, where the only evidence was the two contradictory depositions. As to the argument, that a defendant, if, after an acquittal on such a count as this, he should be subsequently indicted in the usual form for perjury committed before the House of Lords, could not plead *autrefois acquit*, it is perhaps sufficient to say that it cannot apply to this individual case; for here he might so plead. But even if these counts objected to were the only counts in the information, the Court would probably consider the crown as having, in that case, elected to proceed in this way, and would, therefore, prevent them from taking further proceedings in the same matter. As to the omission of the words "wilfully and corruptly," that was necessary, because one of the depositions being true, both could not be wilfully and corruptly made. It is, however, charged that the defendant deliberately, knowingly, and of his own act and consent, did swear, &c., and that is sufficient. In the fourth and fifth counts it is not averred that the defendant's evidence related to material questions. That averment is not

necessary; for it is quite sufficient if on the face of the indictment the questions appear to be material. And this averment is always omitted in the entries in Tremayne. Besides, the sixth and seventh counts do contain the averment; so that it is not important to discuss that question.

Adolphus and *D. F. Jones*, contra. It may be admitted, that if the indictment had charged the perjury to have been committed before the House of Lords, the contradictory evidence previously given before the House of Commons might have been sufficient alone for the jury to have convicted the defendant of perjury. But then they would have found distinctly on which occasion the defendant had sworn falsely. This question is, however, very different. This is not a question upon the sufficiency of evidence, but upon the insufficiency of the shape and form of the accusation. The cases which have been mentioned are not authorities to govern the present; there the indictments appear to have contained counts framed in the ordinary way, as well as a count in this form, and there was a general verdict; and no such objection as the present could be available, if there was any one sufficient count. Besides, none of those cases appear to have undergone much discussion at the bar, or any consideration in Westminster Hall. With respect to the present experiment, it is in truth a charge, in the alternative, imputing, that either on the one occasion or the other, the defendant committed perjury. Now, according to all the rules of criminal pleading, every indictment must contain a precise charge of a specific fact, alleged to be a crime committed on a particular day and at a particular place. Here no particular time or place is alleged, as to the crime intended to be insisted upon; two oaths are stated, of which it is said one must be false; it may be equally said that one must be true; but which was false and which true, the indictment does not state. Suppose an acquittal on such an indictment, and a defendant to be afterwards indicted in the ordinary form for perjury before the House of Lords, he could not plead *auterfoits* acquit, because it is not certain whether this indictment charges him with perjury there; he might then be indicted for perjury before the House of Commons, and he could not plead *auterfoits* acquit for a similar reason; and so, for one offence, he might be tried three times. Suppose, again, that the two oaths are in different counties: in which is he to be tried? Suppose, also, a pardon of all offences up to a particular day. These are difficulties which show, that, as this count is contrary to the principles of criminal pleading, so is it also contrary to justice. In *Com. Dig. Indictment*, G. 2, it is laid down, that it is bad if the day be uncertain, as if the offence be laid in *Festo St. Petri*, and there be two feasts of St. Peter. And in the same book and title, G. 3, many instances are given of indictments for murder and felony, which were held bad for their uncertainty, and for their being laid, as here, in the alternative.* The present form is also contrary to all the precedents of indictments in ordinary use; and the incongruity is here manifest, for the persons framing

* See also 2 Hale's P. C. 178, 179.

it are actually obliged to omit the words wilfully and corruptly, because they cannot say which of the two oaths was wilful or corrupt. And such an omission is fatal; *Rex v. Cox*, 1 Leach's Crown Cases, 82. This indictment is also opposed to the legal definition of the crime of perjury, which comprises a wicked intent and corrupt motive. The mere circumstance of a party's having sworn contrary to what he did on a former occasion, is not, necessarily, perjury. It may have arisen from forgetfulness, inadvertency, or mistake; and therefore a corrupt motive must be alleged; and yet, the bare inconsistency between the two oaths is all that is charged in this indictment. The same conclusion may also be drawn from the provisions of the statute 25 Geo. 2, c. 11, which, while it shortens the allegations in indictments for perjury, expressly retains and directs "the proper averments to *falsify the matters wherein the perjury is assigned*." Besides the point has been distinctly and solemnly decided; for in the case of *Rex v. Perrott*, 2 M. & S. 879, the Court, in giving judgment, lays down the rule as to false pretences, that it must be stated in the indictment which are true and which false, in order to apprise the defendant of the charge; and they appear to have founded their judgment mainly on the analogy to the case of perjury, in which, as they all say, the falsification must not be to the whole, but to the particular thing relied on, as being false; and Lord ELLENBOROUGH there says, that the rule in cases of a mixed nature, where part is true and part false, is to separate, by specific averments, all that which is meant to be relied on as false. Here that is not done, and, therefore, this indictment is bad.

Cur. adv. vult.

And now, on this day, the judgment of the Court was delivered by ABBOTT, C. J. This case came before the Court on a motion in arrest of judgment, the defendant having been convicted on some of the counts of an information exhibited against him by the Attorney-General. One of these counts charges in substance, that a select committee of the House of Commons met to determine the merits of a petition, complaining of an undue election and return of two members of parliament for the borough of Barnstaple; that the defendant was sworn and examined as a witness before the committee at the parish of St. Margaret, Westminster, on the 1st of March, 59 G. 3, and then and there deliberately and knowingly, and of his own act and consent, deposed that he was a voter of the borough: that one Wilkinson took a part for Sir M. L., one of the candidates, that the friends of Sir M. L. were entertained with eating and drinking at Wilkinson's; that he, the defendant, voted for Sir M. L.; that Wilkinson asked him for his vote, and told him he should have 5*l.*, with a proviso that he would give his word then to vote for Sir M. L.; that he did vote for Sir M. L., and also for another of the candidates, Sir Henry Thomson: that he voted for Sir M. L. on account of the promise of 5*l.*, that he should not have voted for Sir M. L. without money, and that he should have given a plumper to Sir H. Thomson, if he had not had the money offered to him. The count then further charges, that at a session of parliament, a bill entitled "An act for preventing bribery and corruption in the

election of members to serve in parliament," was pending before the House of Lords, reciting that bribery and corruption had been practised at B., and was likely to be practised in future unless prevented; that in pursuance of an order of that house for liberty to examine witnesses in support of the bill; the defendant on the 25th June, 59 G. 3, at the parish of St. Margaret, appeared before the House of Lords and was sworn, and then and there knowingly and deliberately, and of his own act and consent, deposed that he was a freeman of Barnstaple, that he remembered the last election, that Wilkinson took a part in the election, and as he believed for Sir M. L.; that W. asked him to vote for Sir M. L., and he told him he would, and that was all that passed; that W. did not at any time say any thing to him as to remuneration for loss of time, that W. did not promise him any satisfaction, or any thing at all, that the sum of 5*l.* was not mentioned between them, that there was not any entertainment going on at W.'s at any time before the election that he knew of; that he, the defendant, voted voluntarily for Sir M. L. or any other gentleman that he wished for, or that his mind led to, that that was his only reason for voting for Sir M. L. The count then avers the identity of persons and places, and concludes thus: "And so the Attorney-General says, that the defendant at the parish of St. Margaret, Westminster, in manner and form aforesaid, did commit wilful and corrupt perjury."

Another of these counts is to the same effect, but with the additional allegations, that the matters deposed by the defendant on each occasion were material.

It is to be observed, that these counts do not charge that the defendant on either occasion swore wilfully, falsely or corruptly; the conclusion that he committed wilful and corrupt perjury is drawn from the previous allegations, that he swore on each occasion knowingly and deliberately, and of his own act and consent, and from the manifest contradiction in the matters sworn. The question therefore is, whether perjury can be legally charged and assigned by showing such contradictory depositions with an averment that each of them was made knowingly and deliberately, but without averring or showing in which of the two depositions the falsehood consisted. And we are of opinion that it cannot.

The first objection that occurs on the perusal of this information is the novelty of its form. One or two instances* of a similar form were

* The following precedent was read during the argument from Mr. Justice Chambre's Precedent Book.

Lancashire, to wit, The jurors for our lord the king, upon their oath present that heretofore, to wit, on the 17th day of January, 1774, at Manchester, in the county aforesaid, one copper dish of the value of 2*s.*, ten pewter plates of the value of 6*s.*, &c., &c., of the goods and chattels of one Robert Stevenson, in the shop of the said R. S., then and there being found, were feloniously stolen, taken, and carried away; and the jurors aforesaid, upon their oath aforesaid, further present, that afterwards, to wit, on the 26th January aforesaid, in the year aforesaid, James Dane of Manchester aforesaid, cobbler, came before T. B. Bayley, Esq., then and still being one of the justices of our said lord the king, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the same county: and was then and there sworn, and took his corporal oath upon the holy gospels of God before the said T. B. B.,

mentioned at the bar, which, however, only show that some respectable draftsmen may of late have thought the experiment worth trying; no one has ever received a judicial decision, and as instances of contradictory swearing have occurred at all times, and as this form of proceeding affords the greatest facility of proof to a prosecutor, the want of precedents of this kind cannot be accounted for but by supposing that an indictment in this form has not been generally considered to be good.

The next and most material objection is, the injury to which a defendant may be exposed. For we think it impossible to say consistently with any known rule of law, that a person acquitted or convicted on an indictment in this form, could plead such acquittal or conviction as a bar to an indictment, charging perjury in the usual way on either of the depositions. The answer to such a plea would be, "you have

the justice aforesaid, he, the said T. B. B. then and there having sufficient power and authority to administer the said oath to the said J. D. in that behalf, and then and there, upon his oath aforesaid, before the said T. B. B. deliberately and knowingly, did say, swear, and give information in writing, that on Monday night the 17th day of January then instant, he, the said J. D. saw James Taylor of ———, and E. Hunt of the same place, shoemaker, go into the shop of R. S. of M. aforesaid, brazier, in Hanging-ditch of M. aforesaid, (meaning the said shop of the before-mentioned R. S.) and that he, the said J. D. was along with them, (meaning the said J. T. and E. H.) and stood at the shop door, (meaning the door of the said shop of the said R. S.) and that Taylor and Hunt (meaning the said J. T. and E. H.) filled a large sack or bag with pewter and other goods out of the said shop, and that Taylor (meaning the said J. T.) carried the sack off, and that Hunt (meaning the said E. H.) filled his pockets, and, that amongst other things, that Taylor (meaning the said J. T.) carried away were one copper dish, &c.; and that Hunt (meaning the said E. H.) carried away in his pockets one pewter gill, &c.; and the jurors aforesaid, upon their oath aforesaid, further present that at this present sessions of oyer and terminer and general jail-delivery, holden at the Castle of Lancaster, in and for the said county, an indictment was found by the jurors aforesaid against the said E. H. for privately and feloniously stealing, taking and carrying away the said first-mentioned one copper dish, &c., of the goods and chattels of the said R. S., in the shop of him, the said R. S., there being found; and the said E. H. being arraigned upon the said indictment before the justices aforesaid, pleaded not guilty thereto; and issue being duly joined upon the said plea so pleaded, the said E. H. was thereupon put upon his trial for the said felony at the said sessions of oyer and terminer and general jail-delivery. And the jurors aforesaid, upon their oath aforesaid, further present that, at the said trial so then and there had as aforesaid the said J. D. was produced as a witness against the said E. H., and was then and there sworn, and took his corporeal oath before the same justices on the holy gospel of God to speak the truth, the whole truth, and nothing but the truth of and upon the premises so put in issue as aforesaid: and the said J. D. being so sworn, did then and there *deliberately and knowingly*, and of his own act and consent, say, depose, and give evidence before the same justices that he, the said J. D., did not see the said E. H. on the night when the said shop of the said R. S. was broken, and so the jurors aforesaid, upon their oath aforesaid, do say that the said J. D., to wit, at Lancaster aforesaid, did in manner and form aforesaid commit wilful and corrupt perjury, to the great displeasure of Almighty God, &c.

The following observations then occur:

It has been doubted whether, if the same person swears contrary ways at different times, he can legally be convicted of perjury without some further proof to falsify that testimony on which the indictment assigns the perjury. For it is said, that on whichever of his contradictory oaths the perjury be assigned, that oath must be taken to be true, unless disproved by two other witnesses. On the other hand, some have thought that if the indictment states the two contradictory oaths, and then concludes, that "so the defendant committed wilful and corrupt perjury," without any averment to falsify the facts sworn in either of the oaths, it is sufficient to warrant a conviction; perhaps an indictment in that form might be sufficient; but even upon the common indictment assigning the perjury upon one of the oaths only, and averring the falsity of the facts there sworn, (in the usual form) it seems that the defendant may justly be convicted without any other proof of the perjury,

never been tried on the charge now preferred against you," and such an answer would undoubtedly be true, in fact, and we think good in law. So that a defendant might be twice put in peril of the punishment of perjury, and perhaps twice convicted and punished on the same subject-matter, if an indictment like the present could be sustained.

It is not necessary to say whether an indictment^a charging contradictory depositions, together with other charges and averments not found in the present information, would be good as an indictment for a misdemeanor. The difficulty of showing on which of two occasions a party swore falsely, may perhaps enable a person to escape punishment whose conduct, like that of the present defendant, may plainly appear to be in the highest degree reprehensible. But we think it better that such a person should escape than that an indictment should be held good, which is liable to the material objection of putting a person twice in peril of the pains of perjury on the same subject-matter, and we know of no election to adopt this or that mode that can be binding on the crown, as was suggested in the argument at the bar in support of this information. The rule to arrest the judgment must therefore be made absolute, and the like rule in the other case of *The King v. Edwards*.

Rule absolute.

than producing and proving the other deposition which the defendant had made in contradiction to that on which the perjury is assigned; for its being the defendant's own deposition, he cannot be admitted to say that deposition was false, for *nemo allegans terpitudinem suam est audiendus*, and if that be true, the other on which the perjury is assigned must of course be false. The reason why in other cases, the perjury must be proved by witnesses that outweigh the testimony of the defendant is, because, where there is only oath against oath, it stands in suspense on which side the truth lies. But when the same person has by opposite oaths, asserted and denied the same fact, the one seems sufficient to disprove the other, and with respect to the defendant (who cannot contradict what he himself has sworn,) is a clear and decisive proof, and will warrant the jury in convicting him on either, for whichever of them is given in evidence to disprove the other, it can hardly be in the defendant's mouth to deny the truth of that evidence as it came from himself. Upon this principle, *YATES, J.*, convicted a man at Lancaster Summer assizes, 1764. He had first made his information on oath before a justice of the peace, that three women were concerned at a riot at his mill, (which was dismantled by a mob, on account of the price of corn;) and afterwards at the sessions, when the rioters were indicted, he was examined concerning those women, and (having been tampered with in their favor,) he then swore that they were not in the riot. There was no evidence on the trial of the defendant for this perjury to prove that the women were in the riot, (which was the perjury assigned,) but the defendant's own original information on oath being produced and read, whereby he had sworn they were in the riot, the judge thought it sufficient to convict him. He was accordingly found guilty and transported.

And afterwards *LORD MANSFIELD, C. J.*, and *WILKOT, and ASTON, Js.*, to whom *YATES, J.* stated the reasons of his judgment, concurred in his opinion.

WOODS and Another, Assignees of ALEXANDER PATON, a
Bankrupt, v. RUSSELL.—p. 942.

A. a ship-builder, contracted with B. to build a ship for him, and to complete her in April, 1819. The latter was to pay for her by four instalments: the first when the keel was laid, the second when at the light plank, and the third and fourth when the ship was launched. Before the 25th of June, 1819, the ship was measured with the builder's privy, to the intent that B. might get her registered in his name. On the 25th of June the ship-builder signed the usual certificate of her building; and on the 26th the ship was registered in B.'s name; and on the same day the third instalment was paid. On the 30th of June, A. committed an act of bankruptcy, upon which a commission afterwards issued. On the 2d of July, the ship not being then completed, or launched, the defendant, and a crew hired by him, took possession of her, and a rudder and cordage, the former of which was made by the ship-builder, and the latter bought by him, for the express purpose of completing the ship: *Held*, first, that the legal effect of the ship-builder's having signed the certificate to enable B. to have the ship registered in his name, was to vest the general property in the ship in B. from the time the registry was completed:

Held, secondly, that as the rudder and cordage were made and bought by the ship-builder, specifically for the ship, they were to be considered as parts of the ship, and that the property in them also vested in B.

Held, thirdly, that the property was not in the possession of the bankrupt as reputed owner, within 24 Jac. 1, c. 19.

Held, fourthly, that although the general property in the ship was vested in B. yet as A. had not parted with the possession, and as he would have had a lien upon the ship for the amount of the fourth instalment, if he had completed it; that the taking possession of the ship by B. without tendering the amount of the fourth instalment, or so much thereof as was due, provided any thing was due, was wrongful, and consequently that the assignees of A. were entitled to recover from B. the amount of the fourth instalment, provided the expenses necessary for the completion of the ship did not amount to that sum, or so much thereof as would remain due after defraying such expense.

THIS case was tried before BAYLEY, J., at the Summer assizes, 1820, and came on for argument in the course of Easter term, upon a special case, which it is unnecessary to set out, as the facts are fully stated in the judgment delivered by the Court. The case was argued by

Littledale, for the plaintiffs. The property in the ship, rudder, and cordage, continued in Paton at the time when he committed the act of bankruptcy, the ship not being then completed. The case of *Mucklow v. Mangles*, 1 Taunt. 318, is an authority expressly in point. There the bankrupt, a barge-builder, had undertaken to build a barge for Pocock, and the latter had paid the whole value in advance, and his name was actually painted on the stern of the vessel after the completion of the work; but before delivery, and before any commission of bankruptcy had issued against the barge-builder, the barge was seized in execution for a debt of the bankrupt. It was held, that no property in the barge passed to Pocock until its completion and delivery, and consequently that the assignees were entitled to recover the value. Here, the bankrupt was only under a contract to deliver the ship, and although the stipulated time for building had actually elapsed, yet the vessel was not completed and launched until after the act of bankruptcy. The certificate under 26 G. 3, c. 60, s. 12, clearly is not to be given till the ship is completed, and until that time, therefore, no property passes to the vendee, *Groves v. Buck*, 3 M. & S. 178, *Towers v. Osborn*, 1 Str. 506. But at all events, the case falls within the

statute of James, for the ship was in the hands of the bankrupt as the reputed owner, *Hay v. Fairbairn*, 2 B. & A. 193, *Robinson v. M' Donnell*, 2 B. & A. 134.

Holt, contra. There are two questions in this case; first, whether the property in the ship, rudder, and cordage, ever passed to the defendant; and, secondly, assuming that it did, whether it continued in the possession of the bankrupt at the time of the act of bankruptcy, as the reputed owner, with the consent of the true owner, within the statute of James. Here the property passed to the defendant under the contract, for there was a delivery to him before the 30th June. The vessel was clearly completed when she was capable of being surveyed and measured. The officers of the customs had taken the usual bond from the master previously to the bankruptcy; the builder, too, on the 26th June, had given the defendant the certificate required by the 26 G. 3, c. 60, s. 20, and from that time he must be taken to have consented that the defendant should have the possession. Secondly, assuming the property to have passed to the defendant, it did not continue, with his consent, in the possession of the bankrupt as reputed owner. That is a question of fact, which ought to have been found; *Muller v. Moss*, 1 M. & S. 338, and *Oliver v. Bartlett*, 3 B. Moore, 597. Besides, the circumstance of the vessel's having been registered in the name of the defendant, and of his having advertised her for freight, afford the strongest evidence that he, and not the bankrupt, was the reputed owner of the ship. *Cur. adv. vult.*

ABBOTT, C. J., now delivered the judgment of the Court.

This was an action of trover for a ship, rudder, and cordage, by the assignees of Alexander Paton, a bankrupt, and the facts were shortly as follows: Paton was a ship-builder, and in October, 1818, he entered into a written contract with the defendant to build and complete a ship for the defendant, and finish and launch her in April, 1819; and the defendant was to pay for the ship by four instalments of 750*l.* each; the first when the keel was laid, the second when they were at the light plank, and the third and fourth when the ship was launched. The payments were to be made by bills at two, four, six, and eight months. The first and second instalments were duly paid. In March, 1819, the defendant appointed a master, who from that time, superintended the building. In May, 1819, the defendant advertised the ship for charter, and on the 16th of June chartered her, with Paton's privity, for a voyage from Newcastle to Newfoundland. Before the 26th of June the ship was measured and surveyed, with Paton's privity, to the intent that the defendant might get her registered in his name. On the 19th June the master entered into the usual bond for delivering up the register; on the 25th Paton signed the usual certificate of her build, &c., and on the 26th the ship was registered in the defendant's name. On that day the defendant paid Paton the third instalment. Paton's certificate described the ship as launched, but that was not the case, and Paton's people continued working upon her, and using his timber and materials till the third of July. One of the master's apprentices was employed on board by his directions from the early part of June, and

on the 30th the master ordered him to sleep on board; but on that same day Paton committed an act of bankruptcy, upon which a commission afterwards issued. On the 2d of July the defendant and a crew he had hired took possession of the ship, and his servants, by his direction, took from Paton's yard and warehouse a rudder and cordage, which Paton had bought for the ship. On the 4th of July the ship was launched. The fourth instalment was never paid. The ship was incomplete when the act of bankruptcy was committed, and the expense of launching her was borne by the defendant. Upon these facts, the questions proposed to the consideration of the Court were, whether the plaintiffs were entitled to recover the value of the ship, in which case the value, subject to a deduction, was to be taken at 3000*l.*; or, if not, whether they were entitled to recover the value of the rudder and cordage; and should the Court be of opinion that they were entitled to neither, a nonsuit was to be entered; and upon these points alone the case was argued before the Court. It has occurred, however, to the Court, that a third question arises upon the facts, which neither party could have intended to exclude, which is this: whether, if the plaintiffs are not entitled to recover the whole value of the ship, they may not be entitled to recover to the extent of so much of the fourth instalment as, if the defendant has the ship, he ought to pay. And, upon the first and second questions, our opinion is in favour of the defendant; upon the last against him. This ship is built upon a special contract, and it is part of the terms of the contract, that given portions of the price shall be paid according to the progress of the work; part when the keel is laid, part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship, and that, as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other. But this case does not depend merely upon the payment of the instalments; so that we are not called upon to decide how far that payment vests the property in the defendant, because, here, Paton signed the certificate to enable the defendant to have the ship registered in his (the defendant's) name, and by that act consented, as it seems to us, that the general property in the ship should be considered from that time as being in the defendant. The defendant had, at that time, paid half what the ship, when complete, would be worth. Paton could not be injured by having the general property in the ship considered as vested in the defendant, because he would still have a lien upon the possession for the residue of the price; and we think the legal effect of signing the certificate for the purpose of having the ship registered was, from the time the registry was complete, to vest the general property in the defendant. In order to register the ship in the defendant's name, an oath would be requisite that the defendant was the owner, and when Paton concurred in what he knew was to lead to that oath, must he not be taken to have consented that the ownership should really be as that oath described it to be? The case of *Macklow v. Mangles*, 1 Taunt. 318, seems to us

to be clearly distinguishable from the present, because the bargain there for building the barge does not appear to have stipulated for the advances which were made, and those advances do not appear to have been regulated by the progress of the work. Mr. Justice Heath's opinion appears to have been founded on the notion that the builder was not tied down to deliver that specific barge, but would have been at full liberty to have substituted any other he was building, and the builder had done no act expressing an unequivocal consent that the general property should be considered vested in the purchaser. The painting of the name upon the stern, the only act there, pledged the builder to nothing; it expressed an intention that the barge should be Pocock's, but it did no more. He might change that intention and obliterate the name. But the signing of the certificate, here, to the intent that the defendant might obtain a registry in his own name, was a consent that what was necessary to enable the defendant to obtain such registry should, as between them, be considered as complete, and that, as the defendant would have to swear that he was sole owner of the ship, the ownership should be considered his. We are, therefore, of opinion, that the assignees, who claim under Paton, are bound equally with him; and, as this is not a case within the statute of James, the plaintiffs are not entitled to recover the general value of the ship. And as to the rudder and cordage, as they were bought by Paton specifically for this ship, though they were not actually attached to it at the time his act of bankruptcy was committed, they seem to us to stand upon the same footing with the ship, and that, if the defendant was entitled to take the ship, he was also entitled to take the rudder and cordage as parts thereof. Upon the last question, however, we are of opinion against the defendant. Though the general ownership was vested in the defendant, the possession remained with Paton; and as the bills for the third and fourth instalments were to be given at the launching of the ship, (when launched,) Paton, had he completed the ship, would have had a lien upon it till those bills were given; and as the defendant thought fit to take the ship before it was complete, after having given bills for the first three instalments only, we think he ought to have given a bill for so much of the fourth instalment as, according to the value of what remained to be done, Paton was entitled to receive; and that, unless what remained to be done would be equal to the whole of the fourth instalment, his taking the ship, without giving or tendering such a bill, was a wrongful taking. We are, therefore, of opinion, that, according to the provision made in that respect in the case, it ought to be referred to Mr. Bainbridge and Mr. Clayton, and such third person as they shall appoint, to take an account of the want of materials stipulated to be provided by Paton not on board, and the fair expense of launching, and to enter the verdict accordingly. If the want of materials, and the expense of launching shall amount to 750*l.*, the verdict to be entered for the defendant; if it shall amount to less than 750*l.*, a verdict for the difference to be entered for the plaintiff.

Judgment accordingly.

APOTHECARIES' COMPANY v. ROBY.—p. 949.

By the 55 G. 3, c. 194, s. 14, it is enacted, "That from and after the 1st day of August, 1815 it shall not be lawful for any person (except persons already in practice as such) to practise as an apothecary, unless he take out a certificate," &c. By section 20, "if any person (except such as are then actually practising as such) shall, after the said 1st day of August, 1815, act or practise as an apothecary without having obtained such certificate, every person so offending shall forfeit 20*l*." *Held*, in an action for the penalty, that it was not sufficient for the defendant, in order to bring himself within the exception, to show that previously to, and on the 12th of July, 1815, (when the act received the royal assent,) he was practising as an apothecary, but that it was necessary to show that he was so practising on the first of August, 1815.

THIS case was argued in the course of this term by *Scarlett, Gurney*, and *Campbell* for the plaintiffs, and by *Denman* and *Chitty* for the defendant. The facts of the case and the argument addressed to the courts, are fully stated and observed upon by the Lord Chief Justice in delivering the judgment of the Court, and it is therefore unnecessary to state them here.

Cur. adv. vult.

ABBOTT, C. J., now delivered the judgment of the Court. This was an action for a penalty on the statute 55 G. 3, c. 194, for practising as an apothecary without having obtained the certificate required by that act, which received the royal assent on the 12th July, 1815. At the trial before me, some evidence was offered on the part of the defendant, to show that he had been practising as an apothecary in town, in June, and some part of July, 1815, including the 12th of July in that year; but as the evidence, such as it was, did not extend to the first day of August, the defendant having before that day left town, and become an assistant to an apothecary at Chatham; and, as I was of opinion, that no person was exempt from this penalty, who was not in practice as an apothecary, on the 1st of August; the jury, under my direction in that respect, found their verdict for the plaintiffs. A rule to show cause why there should not be a new trial was obtained, and upon showing cause it was contended by the plaintiffs, first, that the direction was right in point of law; and if not so, then secondly, that there was no evidence that the defendant had at any time practised as an apothecary within the meaning of this statute. It is not necessary to give any opinion upon the latter point, because we are all of opinion that the direction was right in point of law. The statute was passed, as I have before observed, on the 12th of July, 1815, but it may be said generally to take its effect from the first of August following.

The great object of the statute, as appears by the preamble to the 7th section, was to prevent danger to the health and lives of the king's subjects by ignorant and incompetent practitioners. For this purpose provisions were made regarding two classes of persons, viz. persons practising as apothecaries, and persons acting as assistants to apothecaries. It would be known to the legislature, that some persons would be found engaged in each of those branches at the time (whatever that should be) at which the penalties imposed by the act might be made to take effect, and it was reasonable that some at least of such persons

should be exempted from its enactment; and we are to learn from the language of the statute, what is the precise time at which a person must have been so engaged in order to be thus exempted.

There are five sections in which the time is mentioned, viz. the 14th, 17th, 20th, 21st, and 29th. The 14th regards apothecaries, and is a prohibitory clause, and it runs thus, "from and after the first of August, it shall not be lawful for any person or persons (except persons *already* in practice as such), to practise as an apothecary, unless," &c. Now the word "*already*" as here used is of doubtful import, it may either relate to the first of August or to the passing of the act. The 17th section relates to assistants, and is the prohibitory clause as to them: and it is thus, "from and after the first of August, it shall not be lawful for any person or persons (except the persons *then* acting as assistants), and except those who have served an apprenticeship, to act as an assistant." In this clause there is no ambiguity, the word "*then*" plainly and obviously refers to the first of August.

The 20th section is the penal clause; it embraces both the classes, viz. apothecaries and assistants, with a difference however as to the amount of the penalty; and it is thus, "if any person (except such as are *then* actually practising as such), shall, after the first of August, act or practise as an apothecary without, &c., he shall forfeit 20*l*. And if any person, except such as are *then* acting as such, and except those who have served an apprenticeship, shall after the first day of August act as an assistant, he shall forfeit 5*l*."

In this clause also taken by itself, there is no ambiguity, the word *then* plainly refers to the first of August. And this seems to indicate, that the word *already*, as used in the 14th section, is there used to denote the same day, unless it was intended that no apothecary should be exempt from the penalty, who was not actually in practice both on the 12th of July and the first of August.

The 21st and 29th sections speak of apothecaries only, and do not mention assistants to apothecaries.

The 21st section relates to the recovery of charges, and it is thus: "no apothecary shall be allowed to recover any charges claimed by him in a court of law, unless he shall prove at the trial that he was in practice prior to or on the first of August, or that he has obtained a certificate," &c. Now, it was well observed by Mr. *Campbell*, that this clause relates only to the proof to be given at the trial, and the legislature might not think it expedient to require proof of the precise day, which might lead to questions as to actual employment and practice on that day, but might reasonably conclude, that he who could prove himself to be in practice before the first of August, and was in practice, and claimed charges for practice after that day, was really in practice on that day. We, therefore, do not see anything in this section that may reasonably control the plain language of the 20th section, and it is not necessary to say, whether the word *or* ought in this 21st section to be read as *and*, which has been the construction put on that word in some other statutes, and which may perhaps be its proper construction in this place. The only remaining section to be noticed is the 29th.

the general saving clause. It enacts, that the act shall not lessen, prejudice, or defeat the rights, authorities, privileges, and immunities, vested in and exercised, and enjoyed by either of the two Universities of Oxford and Cambridge, the royal college of physicians, the royal college of surgeons, or the said society of apothecaries, except such as have been altered, varied, or amended by the act, or of any person or persons practising as an apothecary previously to the first of August: but the said universities, colleges, and persons, shall have, &c., all such rights, &c., save and except as aforesaid, in as beneficial a manner as they might have done if the act had not been passed.

Now, if the words previously to the first of August are to be taken in their large and unqualified sense, this saving clause will be quite irreconcilable with the 14th section, whether the word "*already*" there used be referred to the day of the passing of the act, or to the first of August, and also with the 20th section, which plainly mentions the first of August; and the inquiry in any proceeding on the statute may always be, not whether the party was in practice on the 12th July or on the first of August, but whether he had been in practice at any remote period of his life. It is impossible to suppose that this was intended, and it seems to us, that the only mode of reconciling all the clauses and carrying the plain object of the law into effect, is to consider those apothecaries only to be exempt from its provisions who were in practice on the day on which the act took effect, that is, the first of August. This construction is not inconsistent with the words of this clause, for the clause contains only a saving of the rights of those persons who were in practice before the first of August, except as altered or varied by the act, and that alteration is to be found in the 20th section, which imposes the penalties on persons not in practice on the first of August. It is not necessary, as I have before observed, to say in this case, whether a person claiming the exemption must have been in practice both before and on the first of August. If the meaning of this saving clause be doubtful, then, according to all sound rules of construction, the plain sense of the penal clause must prevail. Attending to all the parts of this saving clause, it appears to have been introduced *ex majori cautela*, and not intended to control any previous enactment; we think the language of it too doubtful to have the effect of controlling the plain words of the penal clause, and we are consequently of opinion, that the direction at the trial was right, and that the rule for a new trial must be discharged. Rule discharged.

GILPIN *v.* ENDERBEY, (In Error.)—p. 954.

by deed A. and B. covenanted to become partners in the business of army clothiers for ten years; and that A. should advance 20,000*l.* as part of the capital for carrying on the business, and that B. should find a like sum; that A., during the continuance of the partnership, should have out of the profits, if sufficient, or if not, out of the capital, 2000*l.* yearly for his share of the profits. B. then covenanted, that on the determination of the partnership by effluxion of time, the sum of 20,000*l.* should be repaid to A.; that B. should guarantee all debts and pay all losses. In an action brought upon this deed to recover the 20,000*l.* at the expiration of the ten years, the defendant pleaded that the deed was executed, by way of shift, in pursuance of a usurious agreement. That plea, upon issue joined, was negatived by the verdict of the jury, and judgment was given by the Court of K. B. for the plaintiff: *Held*, upon error in K. B., that after that finding, the deed must be taken to disclose the real intention of the parties, and that it was not in that case void upon the ground of usury.

DECLARATION in covenant stated an indenture of 24th of September, 1807, between the plaintiff in error, W. Gilpin, of the one part, and the defendant, Enderbey, of the other part, whereby, after reciting that the plaintiff and defendant had agreed to become partners in the trade or business of an army clothier, army agent and woollen draper, then carried on by the plaintiff, Gilpin; it was witnessed, that in consideration of the mutual trust and confidence which the said plaintiff and defendant reposed in each other; and in consideration of the covenants and agreements in the said indenture after contained to be entered into by them mutually and reciprocally with each other, each of them, the plaintiff and the defendant, did by that indenture covenant with the other of them in manner following; viz., that they, the plaintiff and defendant, should become partners in the business of an army clothier for the term of ten years; and that defendant should advance 20,000*l.* as part of the capital for carrying on the business; and that defendant having accordingly advanced the sum of 20,000*l.* immediately before the execution of the indenture, the residue of the capital should be provided by plaintiff, Gilpin, or by him and such additional partner as in the said indenture mentioned, and should be equal to at least 20,000*l.*; and further, that during the continuance of the partnership, Enderbey should be entitled to have out of the profits of the said trade, (and in case of any deficiency therein, then out of the capital thereof,) by half yearly portions, a certain sum of money therein mentioned, viz., 2000*l.* per annum, as and for his full dividend or share of the profits or produce of said trade; and that all the residue of the profits of the trade in each half year during the partnership, should, on the days in that behalf mentioned, and also on the determination of the partnership, belong to, and be the sole property of, and be had, received, and taken by Gilpin, as for his share of the profits of the said partnership. And the said plaintiff, Gilpin, by the indenture further covenanted with the defendant, that on the determination of the partnership by effluxion of time, the said sum of 20,000*l.* should be repaid to the defendant, Enderbey, his executors, &c., by six equal instalments, to be computed from the determination of the partnership, and each instalment to be paid at the end of each three calendar months, and interest at the rate of 5*l.* per

per annum for 100*l.*, to be computed from the determination of the said partnership. Breach, non-payment of the 20,000*l.*, together with 3000*l.* for interest on the expiration of the partnership.

The defendant craved oyer of the deed which was set out, and which contained the following covenants besides those set out in the declaration: viz., that the business should be carried on in the name of Gilpin only, or in the names of him and another person who should be admitted into partnership pursuant to the provisions for that purpose in the deed; and that it should be under the sole direction and control of Gilpin or such other partner; and that Gilpin and such partner should undertake the management of the business without any compensation to be made to them on that account; that Gilpin should hire servants and pay their wages out of the profits of the business; that he should keep the books of accounts, which should be open to the inspection of Enderbey, and that he should once every year deliver a balance sheet to him; that all debts and expenses contracted in the trade, and that all losses either by bad debts, decay of goods, suits, or other casualties, and all servants' wages, and other necessary expenses, and the property tax payable in respect of the profits, should be paid out of the partnership stock and effects, including the sum of 20,000*l.*; that Gilpin should pay out of the stock or capital of the partnership, all such losses as should from time to time arise in carrying on the business, and guarantee the payment of all debts which should be due to the partnership: that neither of the parties should become surety during the continuance of the partnership, or compound or release debts, &c., &c.; that in case Gilpin should depart this life at any time before the expiration of ten years, and his executors should refuse to carry on the partnership, they should have power to determine it on giving three month's notice to Enderbey, and on paying out of the partnership money and effects, the sum of 20,000*l.* advanced to the capital of the partnership; and such further sum as should be a proportional part of the sum of 2000*l.* for Enderbey's share of the profits; that on the determination of the partnership by effluxion of time, in case it should so determine, a sufficient part of all the debts due or owing to the partnership, should be fully repaid to Enderbey by six equal instalments, to be computed from the determination of the partnership; that in case at any time during the partnership, the value of the partnership effects should be reduced to the sum of 20,000*l.*, or in case either of the parties should become bankrupt, or depart the realm, or do several other acts therein named, it should be lawful to determine the partnership by notice: and that in case Gilpin should refuse to keep the accounts, or to render a statement, or deny the perusal of the books to Enderbey, that E. might upon one month's notice dissolve and determine the partnership, and that the sum of 20,000*l.* should be payable forthwith from the expiration of the notice. Covenant to refer differences to arbitration and other usual covenants. The defendant then pleaded, that before the making of the indenture, to wit, on, &c., at, &c., it was corruptly and against the form of the statute agreed between the plaintiff and defendant, that the plaintiff should lend and advance to the defendant the sum

of 20,000*l.*, and that the plaintiff should forbear and give day of payment thereof to the said defendant for the space of ten years thence next ensuing; and that the defendant, for the loan of the said sum of 20,000*l.*, and for the forbearing and giving day of payment thereof, should yearly, during the said term of ten years, pay to the plaintiff the sum of 2000*l.*, by equal half yearly portions, on the 24th March and 24th September in each year; and that, for securing the repayment of the sum of 20,000*l.* with such payments half yearly to the plaintiff; the plaintiff and defendant, by way of shift, should execute a certain instrument in the form of a deed of partnership, according to the form and effect of the indenture in the declaration mentioned. And that, in pursuance of said corrupt and unlawful agreement so made, the plaintiff afterwards, to wit, on, &c., at, &c., aforesaid, lent and advanced to the defendant the said sum of 20,000*l.* on the terms aforesaid; and that for securing the payment thereof, with such payments half yearly as aforesaid; the plaintiff and the defendant by way of shift afterwards, to wit, on, &c., at, &c., executed the indenture in the declaration mentioned, and the plaintiff then and there excepted of and from the defendant, the said part of the supposed indenture so by him produced in Court as aforesaid, in pursuance of said corrupt and unlawful agreement, and for the purposes aforesaid. And the defendant avers, that the sum of 2000*l.* so to be paid yearly for the loan of said 20,000*l.* exceeds the rate of 5*l.* per cent. contrary to the form of statute. Whereby the said indenture was and is wholly void in law; and this, &c. Replication, that the plaintiff and the defendant executed the indenture in the declaration mentioned for good and lawful considerations, and not by way of shift or in pursuance of, or upon the said corrupt and unlawful agreement, or for the purpose in the said plea of defendant mentioned, in manner and form as defendant hath in his plea alleged. And this the plaintiff prays may be inquired of by the country, &c. And the defendant doth the like. The jury found a verdict upon the issues joined on the plea in favour of the plaintiff below, thereby negating the corrupt agreement. And the Court of Common Pleas gave judgment for the plaintiff below. The record having been removed into this Court upon a writ of error. The case was argued on a former day in this term, by

Campbell, for the plaintiff in error. This deed is usurious on the face of it, and, although the issues on the pleas were found in favour of the plaintiff below, yet the case is now to be considered as if the deed had been merely set out upon oyer, and the defendant below had demurred. This case is distinguishable from *Dande v. Currer*, Siderfin, 285, for there the usury did not appear on the face of the declaration. Here, the principal was never in hazard; for if the entire capital had been lost in the course of carrying on the trade, Enderbey might still have maintained an action to recover his principal at the end of ten years. If, therefore, at the commencement of the partnership, Gilpin was possessed of property to the amount of 100,000*l.*, and the losses of the trade exceeded the 40,000*l.*, which was the entire capital embarked in it, still Gilpin would be liable to make good, out of his entire fortune, the 20,000*l.* at the end of the ten years; for there is an express

stipulation that all losses shall be borne by Gilpin. This, therefore, was a mere loan to Gilpin of 20,000*l.*, for which the lender was to receive more than 5*l.* per cent. interest. If this be an absolute covenant to repay the 20,000*l.*, with the stipulated interest, the deed is usurious. If, on the other hand, the covenant be conditional, to repay the 20,000*l.* if the profits and capital remaining at the end of ten years are sufficient for that purpose, then the declaration is defective, because it does not contain any averment that the profits and capital were sufficient. In *Morse v. Wilson*, 4 T. R. 353, it was expressly decided, that if the borrower of money give a bond for the principal and interest at 5*l.* per cent., and covenant at the same time also to pay to the lender a certain portion of the profits of a trade carried on by him in partnership with another person, that is an usurious contract, and the obligee cannot recover on the bond.

Parke, contra. In order to constitute usury, there must be a loan of money. Here there was no loan of money to Gilpin. The deed does not even state that the money was advanced to him, but merely that the parties had agreed to become partners for ten years, and that Enderbey should advance 20,000*l.* as part of the capital for carrying on the business. Gilpin did not acquire the whole interest in the sum so advanced, but Enderbey had a joint interest in it with Gilpin. Besides, the jury have found as a fact that this was a bona fide partnership. *Hammett v. Yea*, 1 Bos. & Pul. 153, *Masterman v. Courie*, 3 Campb. 488, *Barclay v. Walmsley*, 4 East, 55, *Doe d. Metcalf v. Brown*, Holt's N. P. Rep. 295, *Yeoman v. Barstow*, Lutw. 273, are authorities to show that there must be an actual loan of money to constitute usury, and that there may be cases where more than 5*l.* per cent. is taken for the use of money, and where the principal is not even put in hazard, where the offence of usury is not committed. The case of *Morse v. Wilson* is distinguishable, because there, there was an actual loan of money. Here there was no loan, but an advance of money for the purpose of carrying on the trade.

Campbell in reply. In the cases cited, no money passed from one party to the other. In *Yeoman v. Barstow* the contract did not appear upon the face of the declaration to be usurious; for it was a contract for old hammered silver, which cannot be considered money. Besides, the authority of that case is much shaken by what fell from Lord ALVANLEY in *Marsh v. Martindale*, 3 Bos. & Pul. 154, and Mr. Comyn in his Treatise on Usury, p. 101, states that case to be at variance with all the other decisions.

Cur. adv. vult.

ABBOTT, C. J., now delivered the judgment of the Court. This case was argued before us a few days ago. It is a writ of error, brought on a judgment of the Court of Common Pleas, in an action of covenant on an indenture, bearing date the 24th of September, 1807. To this action Gilpin, the defendant below, pleaded several pleas of the statute of usury, upon which issues were joined, and found against him, and judgment given for Enderbey, the plaintiff below. The indenture is set forth at large upon the record, and the ground of the writ of error

was, that this indenture manifestly exhibits a case of usury within the statute, and ought, consequently, to be pronounced void in law. The particulars of the deed were so recently adverted to in the argument, that a very concise notice of them will be sufficient. The indenture professes to be a deed of partnership between these parties for ten years. The counsel on both sides agreed that, by the effect of this deed, Gilpin covenants absolutely that Enderbey shall, at the expiration of the ten years, receive the 20,000*l.* therein said to have been advanced by Enderbey for carrying on the trade, whether the stock and capital of the partnership may at that time be sufficient or insufficient for that purpose. The Court adopts this construction thus agreed upon for the purpose of its present judgment. Indeed, the plaintiff below cannot maintain this action upon any other supposition, because he has not averred a sufficiency of stock or capital to answer the whole or any part of the 20,000*l.* claimed, and the defendant below builds his argument of usury mainly on this foundation. According to the contents of this deed, Gilpin was carrying on the business of an army clothier, &c. The parties agree to become partners in that business for ten years. Enderbey advances 20,000*l.*, as part of the capital for carrying on the business, and Gilpin covenants that the residue of the capital shall be provided by him to the amount of at least 20,000*l.* Gilpin is to conduct the trade in his own name, and Enderbey is not to be required to interfere. Enderbey, during the continuance of the partnership, is to take out of the profits, or, if they be insufficient, then out of the capital 2000*l.* per annum, as and for his share of the profits. Gilpin is to pay into the partnership stock all such losses as may arise in carrying on the trade, and to guarantee the payment of all debts that may be owing to the partnership; and at the end of the ten years, if he be then living, Enderbey is to have back his 20,000*l.* as before mentioned. If the partnership effects, stock, debts, and credits, be at any time reduced to 20,000*l.* the partnership may be dissolved.

There are clauses for keeping and exhibiting regular accounts, for referring disputes to arbitration, and several others usual in partnership deeds.

By the execution of this deed, Enderbey undoubtedly made himself answerable as a partner to all strangers, though he might not be answerable as between himself and Gilpin. And if the deed discloses the real facts, and the intention of the parties to it, this is not the case of a loan of money by Enderbey to Gilpin, but a contract of partnership between them of a peculiar kind. If the deed does not disclose the real facts and the intention of the parties, but was executed only as a contrivance to cover a loan of 20,000*l.* for ten years, at 10*l.* per cent., the deed was undoubtedly void; but this is a fact that ought to have been found affirmatively by a jury, to enable the Court thereupon to declare the deed void. No such fact has been found, and, in the absence of such a finding, we must consider the deed as speaking the language of truth. And, so considering it, we cannot pronounce it to be void. The partnership, as constituted by this deed, may be, and probably is, of an unusual kind: but that circumstance will not authorize

us to say, that there was in truth no partnership; and if there was a partnership, there is no loan of money by Enderbey to Gilpin, and no usury. Unusual as such a partnership may be, it is by no means impossible. A man carrying on trade with a capital of 20,000*l.* might have made a profit of 3000*l.* a-year, and might really think and expect, (though I cannot say that, in my opinion, such an expectation was likely to be realized,) that if the capital was doubled, the clear profits would be doubled also, and might, on such expectation, engage that any person who would bring 20,000*l.* should receive 2000*l.* per annum, which would leave 4000*l.* for himself; and so be, in his estimation, a very good bargain. Some such opinion may have produced the contract between these parties. We must take their contract from the deed, and so taking it, we cannot pronounce it to be usurious. The judgment, therefore, must be affirmed.

Judgment affirmed

PHILLIPS *v.* SHAW.—p. 964.

In this case, Vol. IV. p. 435, it ought to have been stated, that there were two counts in the declaration; in the latter of which the *pro ut patet per recordum* was omitted; and that the verdict was taken upon the latter count only.

END OF TRINITY TERM.

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TO

THE PRINCIPAL MATTERS.

ACTION ON THE CASE.

1. An action at common law will not lie for disturbing another in the possession of a pew, unless the pew be annexed to a house in the parish. *Mainwaring v. Giles*, H. 2 and 3 G. 4, 356
2. An action lies for the malicious prosecution of a bad indictment for perjury. *Pippett v. Hearn*, E. 3 G. 4, 634

ACCEPTANCE.

See FRAUDS, STATUTE OF, 2, 5.

ADMINISTRATOR.

In an action by an administrator upon a bill of exchange, payable to the intestate, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills became due, there being no cause of action until there is a party capable of suing.

An agent having money in his hands belonging to his principal, purchases with it a bill of exchange, which he endorses specially to his principal; the latter, at the time of the endorsement, was dead, but that fact was not known to the agent: Held, that the property in the bill passed to the administrator of the principal, and that he might, therefore, sue upon the bill in that character: Held, also, that the administrator was only entitled to recover interest upon bills accepted after the death of the testator from the time of demand of payment made by the administrator, &c., not from the time the bills became due.

Where the declaration stated the drawing of certain bills of exchange, and their acceptance after the death of the intestate, the granting of the letters of administration to the plaintiff, the defendants' liability, &c.; and the defendants pleaded that the cause of action did not accrue within six years, to which the plaintiff replied generally,

that it did accrue within six years: It was held that the replication was good. *Murray, Administrator, v. The East India Company*, M. 2 G. 4, 204

ADVOWSON.

A bond was conditioned for the resignation of a living, which the defendant, when requested, had refused to resign: Held, that he being a wrongdoer, the jury were not bound, in assessing the damages, to confine themselves to the diminution of the value of the advowson to the plaintiff by the defendant's life-interest; nor in estimating the annual proceeds, to deduct the curate's stipend. *Lord Sondes v. Fletcher*, T. 3 G. 4, 835

AMENDMENT.

See PRACTICE, 41.

ANNUITY.

1. By a public act the Waterloo Bridge Company were authorized to raise money for the purpose of completing their undertaking, either among themselves or by the admission of new members, or by granting annuities for a term of years or for life. The act did not contain any provision that the annuities should or should not be redeemable. The Company however, in the original grant, reserved to themselves a power of redemption: Held, under these circumstances, that an auctioneer putting up to sale one of these annuities, was bound in his particulars of sale to describe it as a redeemable annuity. *Coverley v. Burrell*, M. 2 G. 4, 257
2. By the 53 G. 3, c. 141, the memorial of an annuity must contain the description and place of residence of the witnesses to the annuity deed.

A mere surety who charges with the payment of an annuity his estate in fee simple, of which he was seized in possession at the

- time of granting the annuity, and which was of greater annual value than the annuity, is a grantor within the meaning of the 13 G. 3, c. 26, s. 8, and therefore in such a case no memorial is required. *Darwin v. Lincoln and Another*, H. 2 and 3 G. 4, 444
3. Under the 53 G. 3, c. 141, s. 2, it is requisite that the memorial of an annuity should contain the names and places of abode of the witnesses to a warrant of attorney, given as a collateral security; and, therefore, where it was thus stated, A. B., clerk to J. S. of D. Street, in the county of M., gent.: Held, that this was not sufficient, it appearing that A. B. did not reside, but only attended at the office there at the time. *Smith v. Pritchard*, E. 3 G. 4, 717
- But see statute 3 Geo. 4, c. 92.
4. The condition of a bond recited that the obligor had cohabited with a woman for several years, and had by her two children therein named, and that she being desirous to put an end to the connexion, had applied to the obligor to make a provision for herself and children, which he had agreed to do: and for that purpose the obligor entered into the bond in question, which was conditioned to pay to the mother yearly, during the joint natural lives of herself and two children, a certain sum therein mentioned; the annuity to be applied to the maintenance and education of the children as well as of herself: or in case of the death of the two children therein specifically named, then the same annuity was to be payable to her during her life. One of the children died during the lifetime of the mother: Held, that the annuity was payable to her during her life, at all events. *James and Wife v. Tallent*, T. 3 G. 4, 889

APOTHECARIES.

- By the 55 G. 3, c. 194, s. 14, it is enacted, "that from and after the first day of August, 1815, it shall not be lawful for any person (except persons already in practice as such) to practise as an apothecary, unless he takes out a certificate, &c. By section 20, "if any person (except such as are then actually practising as such) shall, after the said 1st day of August, 1815, act or practise as an apothecary without having obtained such certificate, every person so offending shall forfeit 20*l*.: Held, in an action for the penalty, that it was not sufficient for the defendant, in order to bring himself within the exception, to show that previously to and on the 12th of July, 1815, (when the act received the royal assent,) he was practising as an apothecary, but that it was necessary to show that he was so practising on the 1st of August, 1815. *The Apothecaries' Company v. Roby*, T. 3 G. 4, 949

APPEAL.

1. An order of removal was dated the 1st of August, 1814, and an order of suspension endorsed thereon, in consequence of the sickness of the pauper; and a copy of such order and endorsement was, in 1814, served upon the appellants, but the original order not pro-

duced at the time of serving such copy: and subsequently, in 1815, another part of the order and endorsement, executed by the same justices, but bearing date in August, 1814, was served upon the appellants. The pauper was not removed till 1819, when an appeal was duly entered: Held, that the services of the original order of removal in 1814 and 1815 were both defective, and that the appeal was made in time, notwithstanding 49 G. 3, c. 124, s. 2. *Re v. The Inhabitants of Atwick*, M. 2 G. 4, 184

2. By a clause in an enclosure act, a commissioner was authorized to stop up any way, provided it be done by the order, and with the concurrence of two justices, and that order was to be subject to an appeal in like manner, and under such form and restrictions as if the same had been originally made by such justices. By a subsequent clause, any party aggrieved was to be at liberty to appeal at any time within six months after the cause of complaint. Under this act the commissioners, with the concurrence and order of two justices, stopped up a road, without giving the public notices required by the 55 G. 3, c. 68: Held, that a party aggrieved might, under these circumstances, appeal at any time within six months. Quere, whether it be necessary to give such notices where roads are stopped up under the provisions of an enclosure act. *Re v. Townsend*, H. 2 and 3 G. 4, 420
3. Where an order of removal has been executed, and by consent of the removing pariah and the magistrates making it, it is superseded, and the paupers taken back, it is in the discretion of the sessions to enter an appeal against it or not, according as they may think that justice requires it, in order to compel the respondents to pay the costs of maintenance, &c., incurred by the appellants before the order was superseded. *Re v. The Justices of Norfolk*, H. 2 and 3 G. 4, 484
4. The 18 G. 3, c. 19, s. 5, gives an appeal only in case the majority of overseers concur in it. *Re v. Justices of Lancashire*, E. 3 G. 4, 755

APPEAL, (Notice of.)

1. It is not necessary, in order to give the justices at sessions jurisdiction to hear an appeal against overseers' accounts, that such accounts should previously have been examined and allowed, pursuant to 50 G. 3, c. 49. *Re v. The Justices of Colchester*, H. 2 and 3 G. 4, 535
2. Where a statute gives an appeal, the appellant giving reasonable notice to the other parties, such notice need not be in writing; but a verbal notice, if reasonable as to time, is sufficient. *Re v. The Justices of Surrey*, H. 2 and 3 G. 4, 539

APPORTIONMENT.

See LANDLORD AND TENANT, 11.

APPROPRIATION.

See PLEADING, 28.

ARBITRAMENT.

1. A submission to arbitration under 9 and 10 W. 3, c. 15, s. 1, may be made a rule of court in vacation. In the *Matter of Taylor*, M. 2 G. 4, 217
2. Declaration stated that defendant covenanted to obey, abide by, and perform an award, and that he would not prevent the arbitrators from making their award. It then stated that the arbitrators made their award, and thereby directed the defendant to pay a certain sum therein mentioned; and alleged as a breach of the covenant, that the defendant did not pay the sum awarded. Plea, that before the award, defendant, by deed, revoked the authority of the arbitrators, of which revocation they had notice: Held, upon demurrer, that defendant was entitled to judgment, although it appeared by the plea that he had been guilty of a breach of the covenant to abide by the award, by revoking the authority of the arbitrators, the plaintiff being entitled to recover damages only in respect of the cause of action stated in his declaration, and not in respect of a cause of action disclosed in the plea.
The second count of the declaration stated the deed of reference, and then averred that defendant did, before the making of the award, hinder and prevent the arbitrators from making their award in this, that the defendant, by a certain deed in writing, signed and sealed to him, after reciting, as was therein recited, did revoke the authority: Held, upon demurrer, that this was an allegation, not of the mere legal effect of the deed, but of the fact of revocation; and that it was unnecessary to state that the arbitrators had notice of the revocation, that being necessarily implied in the averment, that the defendant had revoked the authority. *Marsh, Executor of Quindan, v. Bulleel*, H. 2 and 3 G. 4, 507
3. Where an action for breach of covenant was pending, and, with all matters in difference, was referred to arbitration, the costs of the suit to abide the event: Held, that an award that the plaintiff had no demand on the defendant on account of any alleged breaches of covenant, or on any other account whatsoever, was final, although the suit was not, in terms, put an end to. *Jackson v. Yabeley*, T. 3 G. 4, 848

ARREST.

1. Where, in the account between plaintiff and defendant, there are items clearly due on both sides, it is an arrest without reasonable and probable cause within 43 G. 3, c. 46, s. 3, if the plaintiff arrests and holds the defendant to bail for the amount due to him, without at the same time giving him credit for the items clearly due on the other side of the account. He ought only to hold the defendant to bail for the admitted balance. *Dronefeld v. Archer*, H. 2 and 3 G. 4, 513
2. Where a defendant being previously in custody in execution for a debt, a detainer was lodged against him, but for too large a sum, and on this being discovered in a few hours, the plaintiff discontinued on payment

of costs, and before the payment of costs lodged a fresh detainer. Held, that this second detainer was regular, and that it was not like the case of a fresh arrest which cannot be made till the costs have been paid. *White v. Gomperts*, T. T. 3 G. 4, 905

ASSIGNMENT.

1. Declaration stated, that in consideration that plaintiff would assign to defendant a bill of exchange, defendant undertook, &c., and then averred that plaintiff did assign the bill. It appeared that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff by deed assigned to the defendant, the bill and all sums of money due thereon, to and for the defendant's own use, and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill: Held, that the declaration imported, that the plaintiff had made an absolute assignment of the bill; and consequently, that the assignment in evidence being only conditional, this was a fatal variance. *Yansandau v. Burt*, M. 2 G. 4, 42
2. Where there were two assignments of the same lease of premises within the county of Middlesex, and that executed last was registered first: Held, that the deed last registered must, in a court of law, be considered as fraudulent and void, in consequence of 7 Ann. c. 20, s. 1, although the party claiming under the second assignment had full knowledge, when it was executed, of the prior execution of the first assignment. *Doe dem. Robinson v. Alsop*, M. 2 G. 4, 142
3. Where an assignment of a lease by deed, taken in execution, was made in the name and under the seal of office of the sheriff, by A. B., acting as under-sheriff: Held, that such assignment was sufficiently proved, without proving further the appointment of A. B. as undersheriff, and that he had power by deed to execute deeds in the name of the sheriff. *Doe dem. James v. Brown*, M. 2 G. 4, 243

ASSUMPSIT.

See CARRIERS, 1, 2.

1. The giving up a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and therefore, where a ship having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings, the agents of the owners of the vessel detained, agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damages: Held, that there being contradictory decisions as to the point whether

- the shipowners were liable for an injury done while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages. *Longridge and Another v. Dorville and Another*, M. 2 G. 4, 117
2. Assumpsit will lie upon a bill of exchange against a trading corporation whose power of drawing and accepting bills is recognised by statute. *Murray v. The East India Company*, M. 2 G. 4, 204
3. A printer cannot recover for labour or materials used in printing any work, unless he affixes his name to it, pursuant to the 39 G. 3, c. 79, s. 27. *Bensley v. Bignold*, H. 2 and 3 G. 4, 335

ATTACHMENT.

See PRACTICE, 20.

ATTORNEY.

See PRACTICE, 9, 42.

1. Where an attorney, in order to get possession of papers belonging to A. B., in the hands of A. B.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that A. B. should enter into an unqualified reference, not revocable, &c.: Held, that A. B. having become subsequently bankrupt for the second time, and without paying 15s. in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 G. 3, c. 121, s. 14, so as to dispense with the reference; and that the attorney was liable, pursuant to his undertaking, to procure A. B.'s signature to an agreement of reference, and to find security for the performance of the award to the satisfaction of the Master. *Ex parte Hughes*, H. 2 and 3 G. 4, 482
2. A clerk to an attorney held, during the term for which he was bound, the office of surveyor of taxes under the crown: Held, that he could not, within 22 G. 2, c. 46, s. 8 and 10, be considered as serving his whole time and term in the proper business of an attorney; and that he ought not to be admitted on the roll; and that having been admitted, he ought to be struck off. *Ex parte Taylor*, Gent. one, &c., H. 2 and 3 G. 4, 538
3. An attorney brought his action for his bill of costs, and held the defendant to bail for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for so doing: Held, that this was a case within the 43 G. 3, c. 46, s. 3; and that if not within the statute, still the Court, in the exercise of its jurisdiction over its officers, would compel an attorney to pay costs under such circumstances. *Robinson v. Elam*, E. 3 G. 4, 661
4. Where a bailiff had written to an attorney for writs, which the latter sent without knowing anything of the parties or circumstances, but the bailiff never represented himself, or had been considered as an attorney, nor looked for any profit upon the law proceedings: Held, that this was not a case within the 22 G. 2, c. 46, s. 11; but that it was a

most improper practice, which the Court, in virtue of its general jurisdiction over attorneys, would punish severely. *Ex parte Wharton*, T. 3 G. 4, 824

AUCTIONEER.

See ANNUITY, 1. FRAUDS, STATUTE OF, 1.

AWARD.

See ARBITRAMENT, 2, 3. TITHE, 2.

BAIL.

See PRACTICE, 6, 9, 17, 18.

BANKERS.

See PLEADING, 28.

BANKRUPT.

1. A., B., and C. entered into a bond to the king, the condition of which was, that A., as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum; and also the price of such vellum, together with all moneys which he should receive on account of the duties on personal legacies and stage-coaches. A., as subdistributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. A. sci. fa. having afterwards issued upon the bond, B., one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same: Held, in an action brought by the surety to recover these sums from the bankrupt, that A. was a person "surety for, or liable for, a debt" of the bankrupt, within the meaning of the 49 G. 3, c. 121, s. 8, and consequently that the latter was protected by his certificate: Held, also, that the general plea of bankruptcy was well pleaded. *Westcott v. Hodges*, M. 2 G. 4, 12
2. The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale; the factor being also similarly indebted to J. S., sold the goods to him. The factor afterwards became bankrupt; and on a settlement of accounts between J. S. and the assignees, J. S. allowed credit to them for the price of goods, and he then proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and his assignees, afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner. *Hudson v. Granger*, M. 2 G. 4, 27
3. A., a foreign merchant, purchased in his own name, but on account and with the money of B., a British merchant, certain bank shares in the French funds. The latter drew bills upon A., which he accepted, on the security of those shares standing in his name; and these bills were assigned by B., for a valuable consideration, to C., a British subject. Before they became due, B. autho-

- rized A. by letter to sell the bank shares, in order to reimburse himself against the bills. Before that letter arrived, A. had stopped payment, and afterwards became bankrupt, and the bills were dishonoured; B., also, afterwards became bankrupt. C., by process in the foreign country, attached the bank-shares still standing in the name of A. for the debts due to him upon the bills; and the Court there decreed that the bank shares should be sold, and that the proceeds should be applied, first, to pay a debt due from B. to A., and afterwards to retire the bills. Under this decree, C. received a certain sum of money on account of the bills: Held, that the assignees of A. could not recover back this money as money belonging to B. *Casnowe and Another, Assignees of Power and Warwick, Bankrupts, v. Prevost and Others*, M. 2 G. 4. 70
4. Declaration upon four bills of exchange. Plea in bar, that defendant was indebted to plaintiffs in divers large sums of money for goods sold; and that, for securing to the plaintiffs the said several sums of money, defendant, before his bankruptcy, accepted a bill of exchange drawn by the plaintiffs, for and in payment of one of the said several sums of money in which he was so indebted as aforesaid; and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the said several sums of money, in which he so stood indebted as aforesaid. The plea then stated that defendant had duly become bankrupt; and that the bills of exchange mentioned in the declaration were provable under the commission; and that the plaintiffs, being creditors of the defendant for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission, and thereby made their election to take the benefit of the commission, not only with respect to the debt so proved, but also as to the bills and debts mentioned in the declaration: Held, upon demurrer, that this plea could not be supported; first, because the proof of a debt under the commission of bankruptcy cannot be pleaded in bar to an action at law brought for the same debt; secondly, that the election of the creditor to take the benefit of the commission, is confined by the 49 G. 3, c. 121, s. 14, to the debt actually proved, and does not extend to distinct debts ejusdem generis due at the same time. *Harley and Another v. Greenwood*, M. 2 G. 4. 95
5. A pawnbroker is a broker within the 5 G. 2, c. 30, s. 39, and therefore subject to the bankrupt laws.
- A person who had formerly taken in goods upon pledge, but had ceased to do so, still continuing to sell the unredeemed pledges, thereby carries on the trade of a pawnbroker, and is subject to the bankrupt laws. *Rawlinson v. Pearson and Others*, M. 2 G. 4. 124
6. A., spirit merchant, sold to B., a wine merchant, several casks of brandy, some of which, at the time of the sale, were in A.'s own vaults, and others in the vaults of a regular warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided, that this sale had taken place; but no notice of such sale had been given to the warehouse-keeper, with whom some of the casks were deposited. A. having become bankrupt while the brandies remained where they were originally deposited, it was held, that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the 21 Jac. 1, c. 19. *Knowles v. Horsfall and Others*, M. 2 G. 4. 134
7. Where a bond was given under 4 G. 3, c. 33, s. 1, by a member of parliament, being a trader, and, after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given: Held, that the bankruptcy and certificate were no discharge to the bond. *Jameson and Another v. Campbell*, M. 2 G. 4. 250
8. A testator devised a copyhold estate to his wife for life, remainder to his son, and the heirs of his body, and there was no custom in the manor to entail copyholds; the son survived his mother, and had issue, and having become bankrupt, he died before admittance, and before any bargain and sale was executed by the commissioners of this estate: Held, that he took a fee-simple, conditional at common law, and that the commissioners might execute a valid conveyance of the estate after his death, pursuant to 1 Jac. c. 15, s. 17. *Doe dem. Spencer v. Clark*, H. 2 and 3 G. 4. 458
9. Where an attorney, in order to get possession of papers belonging to A. B., in the hands of A. B.'s former attorney, who had a lien upon them for the amount of his bill then in dispute, undertook that A. B. should enter into an unqualified reference, not revocable, &c.: Held, that A. B. having become subsequently bankrupt for the second time, and without paying 15s. in the pound, the proof of the debt under the commission was not an election by the former attorney under 49 G. 3, c. 121, s. 14, so as to dispense with the reference; and that the attorney was liable, pursuant to his undertaking, to procure A. B.'s signature to an agreement of reference, and to find security for the performance of the award to the satisfaction of the Master. *Ex parte Hughes*, H. 2 and 3 G. 4. 482
10. A smuggler may be a trader within 1 Jac. 1, c. 15, s. 2, as being a person who seeks his trade of living by buying and selling, although such buying and selling be illegal. A penalty due to the crown is a debt within 21 Jac. 1, c. 19, s. 2; and, therefore, where a trader lay in prison above two months, being unable to pay exchequer penalties for smuggling: Held, that it was an act of bankruptcy. *Cobb, Assignee of Money, v. Symonds*, H. 2 and 3 G. 4. 516
11. The commissioners of bankrupt are authorised by the 49 G. 3, c. 121, s. 13, to bring

- up a bankrupt, charged in execution, for the purpose of a full disclosure of his estate and effects, at any of the three meetings under the commission, or any adjournment thereof. *Spence and Another v. Jones*, E. 3 G. 4, 705
12. A bankrupt in the interval between the second and third meetings under his commission, gave a promissory note as a security for a pre-existing debt to a creditor, who was acting as one of the commissioners at the time, and afterwards signed the bankrupt's certificate. The debt for which the security was given was not proved under the commission: Held, that such security was invalid, and that no action could be maintained upon it. *Haywood, Gent., one, &c., v. Chambers*, E. 3 G. 4, 753
13. Where a surety in a warrant of attorney, in order to discharge himself from his personal liability, paid part of the debt due to the creditor of a bankrupt, who had proved under the commission, and thereupon satisfaction was entered on the record: Held, that this did not fall within the 49 G. 3, c. 121, s. 8, as being a payment of part of a debt in discharge of the whole, and that consequently the bankrupt's certificate was no bar to an action by the surety to recover the money so paid by him. *Soutten v. Soutten*, T. 3 G. 4, 852
14. Where J. S., being desirous of making a shipment for his own risk and advantage, but not in his own name, represented to the merchants through whom the shipment was to be made, that the goods were the property of A., and shipped on his account; and A. accordingly, by the desire of J. S., wrote to those merchants, stating the party to be so, and directing them to insure, and to advance money to J. S. on the goods, which was done: Held, that this was a credit given to A. by J. S., by the delivery of goods, in its nature likely to terminate in a debt; and that, therefore, J. S. having subsequently become a bankrupt, A. was entitled to recover the proceeds of the shipment from the merchants, and to set off against them a debt due from the bankrupt to him, it being a case of mutual credit within 5 G. 2, s. 30, a. 28. *Essex and Others, Assignees of Dowland, a Bankrupt, v. Cato*, T. 3 G. 4, 861
- drew bills upon A., which he accepted, on the security of those shares standing in his name; and these bills were assigned by B., for a valuable consideration, to C., a British subject. Before they became due, B. authorized A. by letter to sell the bank shares, in order to reimburse himself against the bills. Before that letter arrived, A. had stopped payment, and afterwards became bankrupt, and the bills were dishonoured; B. also afterwards became bankrupt. C., by process in the foreign country, attached the bank shares still standing in the name of A., for the debts due to him upon the bills; and the court there decreed that the bank shares should be sold, and that the proceeds should be applied, first, to pay a debt due from B. to A., and afterwards to retire the bills. Under this decree C. received a certain sum of money on account of the bills: Held, that the assignees of A. could not recover back this money as money belonging to B. *Casenove and Another, Assignees of Power, v. Prevost and Others*, M. 2 G. 4, 70
2. The condition of a bond, after reciting that defendant and J. S. had delivered and endorsed to the plaintiff a bill of exchange drawn by J. S., and accepted by A. B., was, that defendant and J. S., or either of them, their heirs, &c., should pay or cause to be paid to the plaintiff, his executors, &c., the sum secured by the bill, within one month after it should become due and payable, in case it should not be then paid by the acceptor to the plaintiff, his executors, &c., according to the tenor of the said bill, together with interest from the time the bill became due: Held, that, to an action on this bond, it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and J. S., or either of them. *Murray v. King*, M. 2 G. 4, 165
3. Assumpsit will lie upon a bill of exchange against a trading corporation whose power of drawing and accepting bills is recognised by statute. *Murray, Administrator, v. The East India Company*, M. 2 G. 4, 204
4. A bill of exchange was accepted, payable at Messrs. P. and H., bankers, London, but was not presented there for payment when due, nor until some days after: the acceptor is still liable, no inconvenience having resulted to him from the delay to present the bill. *Rhodes v. Gent*, M. 2 G. 4, 244
4. When a defendant, having once written his acceptance with the intention of accepting a bill, afterwards changes his mind, and before it is communicated to the holder, or the bill delivered back to him, obliterates his acceptance: Held, that he is not bound as acceptor. *Cox and Others v. Troy*, H. 2 and 3 G. 4, 474
6. Three persons joined as drawer, acceptor, and first endorser, in making an accommodation bill; and it was afterwards issued for value to J. S. Previously to its being so issued, its date had been altered: Held, that the acceptor having assented to the alteration when he was informed of it, it was no answer

BASTARD.

See SETTLEMENT, 4.

BATHING, RIGHT OF.

The public have no common-law right of bathing in the sea; and, as incident thereto, of crossing the sea shore on foot, or with bathing machines for that purpose. *Blundell v. Catterall*, M. 2 G. 4, 268

BILLS OF EXCHANGE.

See SET-OFF.

1. A., a foreign merchant, purchased in his own name, but on account and with the money of B., a British merchant, certain bank shares in the French funds. The latter

drawn bills upon A., which he accepted, on the security of those shares standing in his name; and these bills were assigned by B., for a valuable consideration, to C., a British subject. Before they became due, B. authorized A. by letter to sell the bank shares, in order to reimburse himself against the bills. Before that letter arrived, A. had stopped payment, and afterwards became bankrupt, and the bills were dishonoured; B. also afterwards became bankrupt. C., by process in the foreign country, attached the bank shares still standing in the name of A., for the debts due to him upon the bills; and the court there decreed that the bank shares should be sold, and that the proceeds should be applied, first, to pay a debt due from B. to A., and afterwards to retire the bills. Under this decree C. received a certain sum of money on account of the bills: Held, that the assignees of A. could not recover back this money as money belonging to B. *Casenove and Another, Assignees of Power, v. Prevost and Others*, M. 2 G. 4, 70

to an action on the bill against him, that the bill had been so altered without the consent of the drawer and first endorser, and that a fresh stamp was not necessary in consequence of such alteration, the bill having been altered before it was issued in point of law. An accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law. *Downes v. Richardson and Others, Assignees of Thomson, a Bankrupt*, E. 3 G. 4, 674

BILL OF SALE.

See VENDOR AND VENDEE, 8.

BOND.

1. A., B., and C. entered into a bond to the king, the condition of which was, that A., as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum; and also the price of such vellum, together with all moneys which he should receive on account of the duties on personal legacies and stage-coaches. A., as subdistributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. A sci. fa. having afterwards issued upon the bond, B., one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same: Held, in an action brought by the surety to recover these sums from the bankrupt, that A. was a person "surety for, or liable for, a debt" of the bankrupt, within the meaning of the 49 G. 3, c. 121, s. 8; and consequently that the latter was protected by his certificate: Held, also, that the general plea of bankruptcy was well pleaded. *Westcott v. Hodges*, M. 2 G. 4, 12
2. The condition of a bond, after reciting that defendant and I. S. had delivered and endorsed to the plaintiff a bill of exchange drawn by I. S., and accepted by A. B., was, that defendant and I. S., or either of them, their heirs, &c., should pay or cause to be paid to the plaintiff, his executors, &c., the sum secured by the bill, within one month after it should become due and payable, in case it should not be then paid by the acceptor to the plaintiff, his executors, &c., according to the tenor of the said bill, together with interest from the time the bill became due: Held, that, to an action on this bond, it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and I. S., or either of them. *Murray v. King*, M. 2 G. 4, 165
3. It is not any defence at law, to an action on a bond against a surety, that by a parol agreement time has been given to the principal. *Davie and Others v. Prendergrass*, M. 2 G. 4, 187
4. Where a bond was given under 4 G. 3, c. 33, s. 1, by a member of parliament, being a trader, and, after his bankruptcy, but before his certificate, judgment was obtained in the suit in which the bond was given: Held, that

the bankruptcy and certificate were no discharge to the bond. *Jameson and Another v. Campbell*, M. 2 G. 4, 250

5. The condition of a bond, after reciting that A., B., and C. had filed a bill in equity against D. and E., was, that the obligee would pay all such costs as the Court of Chancery should award to the defendants on the hearing of the cause: Held, by three justices (Abbott, C. J., dubitante), that the death of E. before any costs awarded could not be pleaded in discharge of the bond. *Kipling v. Turner*, M. 2 G. 4, 261
5. Debt on a bond given to plaintiff, as treasurer of a friendly society: Plea, that the rules of the society had not been confirmed at the quarter sessions, pursuant to 33 G. 3, c. 54: Held, upon demurrer, that the plea was bad, the bond being a good bond at common law. *Jones v. Woodlam*, E. 3 G. 4, 769

BROKER.

See PRINCIPAL AND AGENT, 3.

- A pawnbroker is a broker within the 5 G. 2, c. 30, s. 39, and therefore subject to the bankrupt laws. *Rawlinson v. Pearson and Others*, M. 2 G. 4, 124

CARRIER.

1. A parcel which, with its contents, exceeded 5*l.* in value, having been delivered to A. and B., common carriers, to be carried by their mail-coach, was accepted by them to be so carried, and was actually put into the mail, and carried by that conveyance a short distance; it was then taken out of the mail-coach by a servant of the carriers, and left to be forwarded by another coach, of which A. was one of the proprietors, but in which B. had no concern; and the parcel was lost. The carriers had previously given notice that they would not be responsible for any package containing specified articles, or which, with its contents, should exceed 5*l.* in value, if lost or damaged, unless an insurance were paid: Held, that, notwithstanding this notice, the carriers were responsible for the parcel in question in consequence of their having delivered it to be carried by another coach, of which one of the carriers only was proprietor. *Garnett and Another v. Willan and Jones*, M. 2 G. 4, 53
2. A parcel containing country bankers' notes, of the value of 1300*l.*, and addressed to their clerk, in order to conceal the nature of its contents, was delivered to the carrier, without any notice of its value, to be carried by a mail-coach, and was accepted by him to be so carried. The parcel was sent by a different coach, and was lost. The carriers had previously given notice that they would not be answerable for any parcel above 5*l.* in value, if lost or damaged, unless an insurance were paid. No insurance having been paid in this case, Held, notwithstanding, that the carrier was responsible for the loss. *Sleat and Others v. Fagg*, H. 2 and 3 G. 4, 342
3. A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for

any general balance due from their respective owners. Goods having been sent by the carrier, addressed to the order of J. S., a mere factor: Held, that the carrier had not, as against the real owner, any lien for the balance due from J. S. Query, whether, if the notice had been, that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from J. S. *Wright v. Snell and Others*, H. 2 and 3 G. 4, 350

CERTIORARI.

The 17 G. 3, c. 56, s. 22, takes away the writ of certiorari only from offences for the first time, created by 22 G. 2, c. 27, and does not apply to those created by 12 G. 1, c. 34, and extended to the silk and cotton trades, by 22 G. 2, c. 27. *Rez v. Rogers*, E. 3 G. 4, 773

COMMISSIONERS.

See SEWERS.

An enclosure act empowered the commissioners to make a rate to defray the expenses of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners. Expenses were incurred in the execution of the act before any rate was made. To defray these expenses the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned, on account of the public drainage, and to place the same to their account, as commissioners. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts: Held, that the commissioners were personally responsible to the bankers for the drafts so made.

The latter having from time to time made half-yearly rests in the account, and charged interest upon the balance then struck, and the commissioners having assented to that mode of keeping the accounts, it was held, that this mode of charging interest half-yearly was not unlawful on the ground of usury. *Eaton and Others v. Bell*, M. 2 G. 4, 34

COMMITMENT.

A commitment for a contempt being a commitment for punishment, must be for a time certain, and consequently a commitment for a contempt till the defendant is discharged by due course of law, is bad. *Rez v. James*, T. 3 G. 4, 894

COMMON.

See TITHE, 1. INCLOSURE ACT, 1.

COMPOUND INTEREST.

See USURY, 1.

CONSTABLE.

1. A constable apprehended an offender for a misdemeanor committed in his presence in a

place of religious worship, and carried him before a magistrate, and was bound over by recognisance to prosecute him for the offence: Held, that the expenses of such a prosecution were not moneys expended by him in doing the business of his township, and that he could not charge them in his accounts, under 18 G. 3, c. 19, s. 4. *Rez v. Seville and Others*, M. 2 G. 4, 180

2. Where, in an application for a quo warranto against a constable, the affidavits in support of the rule stated, that for 50 years back, and as long as deponents could recollect, there had been a custom in the town to elect a constable in a particular mode, but did not expressly state that they believed such custom to be immemorial: Held, that it was not sufficient. *Rez v. Lane*, H. 2 and 3 G. 4, 488

CONTINUANCE.

See PRACTICE, 4.

CONTUMACE CAPIENDO, WRIT OF.

See WARRANT.

CONVICTION.

Where the sessions, without hearing the merits, quashed a conviction under 39 and 40 G. 3, c. 106, s. 4, for a defect in form, the Court of King's Bench will, upon a removal of the order by certiorari, quash the order of sessions, if they are of opinion that there is no defect in form, and send the case back to be heard upon the merits; it was stated in such conviction that defendants had attended a meeting for carrying on a combination of journeymen, for the purpose of obtaining an advance of wages: Held, that this expression was synonymous with the words of the act, which prohibits combination to obtain an advance of wages, and that the conviction was sufficient. *Rez v. Ridgway*, H. 2 & 3 G. 4, 527

COPYHOLD.

See BANKRUPT, 8.

1. Where, by the custom of a manor, a feme covert was allowed by will to pass her copyhold lands, the same having been previously surrendered by husband and wife, (the wife having been examined separate and apart from her husband and consented thereto), to the use of her will: and a feme covert being seized of copyhold lands in the manor, made her will subsequently to the 55 G. 3, c. 192, and there was no surrender to the use of her will: Held, that the copyholds did not pass by the will, the 55 G. 3, c. 192, having only supplied the want of a formal surrender, and the surrender in this case being matter of substance, and requiring to be accompanied by the separate examination of the wife. *Doc dem. Nethercote v. Bartle*, H. 2 and 3 G. 4, 492

2. Where a copyholder has been admitted to a tenement and done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture from showing that the

legal estate was not in the lord at the time of admittance. *Doe dem. Nepean, Bart. v. Budden*, E. 3 G. 4, 626

COPYRIGHT.

1. The manager of a theatre having publicly represented for profit a tragedy altered and abridged for the stage, without the consent of the owner of the copyright, is not liable to an action, although the tragedy had been previously printed and published for sale. *Murray v. Elliston*, E. 3 G. 4, 657
2. The vendor of a print, being a copy in part of another, by varying in some trifling respects from the main design, is liable to an action by the proprietor of the original; and that although the vendor did not know it to be a copy. *West v. Francis*, E. 3 G. 4, 737

CORPORATION.

See ASSUMPSIT, 2.

COSTS.

See PRACTICE, 2, 7, 8, 9, 10, 15, 16, 28, 32, 49.

COUNTY RATE.

See JUSTICES, 2.

By charter the king granted, that the steward and suitors of a manor should have power to hold a court for the determination of civil suits, and there had been a non-user of the court for fifty years (except for the purpose of levying fines and suffering recoveries): Held, that this court being for the public benefit, the words of permission in the charter were obligatory, and that the right of determining suits was not lost by the non-user. *Rex v. The Steward and Suitors of Havering Atte Bower*, E. 3 G. 4, 691
Rex v. The Mayor and jurats of Hastings, &c., S. P. 692

COURT LEET, STEWARD OF.

See PRACTICE, 42.

COURT OF REQUESTS.

An infant cannot be appointed to the office of clerk of a court of requests, where it is part of the duty of that officer to receive the money of the suitors. *Claridge v. Evelyn and Others*, M. 2 G. 4, 81

COVENANT.

1. A covenant to insure against fire premises situated within the weekly bills of mortality mentioned in 14 G. 3, c. 78, is a covenant that runs with the land. *Vernon v. Smith*, M. 2 G. 4, 1
2. A covenant by a lessee, that he will sufficiently muck and manure the land with two sufficient sets of muck, within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenant's laying on two sets

of muck within the three last years of the term. *Pownall v. Moores*, H. 2 and 3 G. 4, 416

CRIMINAL INFORMATION.

1. The Court will grant a criminal information for a libel upon a public body of men upon an affidavit, stating the publication of the libel by the defendant. *Rex v. Williams*, E. 3 G. 4, 595
2. Where the facts tending to criminate a magistrate took place twelve months before the application to the Court, they refused to grant a criminal information, although the prosecutor, in order to excuse the delay, stated that the facts had not come to his knowledge till very shortly previous to the application. *Rex v. Bishop*, E. 3 G. 4, 612
3. An information for perjury stated, that defendant, before a committee of the House of Commons, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c. It then set out the evidence so given. The count then averred, that the defendant, at the bar of the House of Lords, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c. It then set out his evidence, which was directly contrary to that given before the House of Commons; and concluded (after averments as to the identity of the persons and places referred to in the evidence on both occasions), and so the jurors aforesaid do say, that the said E. H. did commit wilful and corrupt perjury: Held, on motion in arrest of judgment, that this count was bad. *Rex v. Harris*, T. 3 G. 4, 926

CUSTOM.

Where in an application for a quo warranto against a constable, the affidavits in support of the rule stated that for fifty years back, and as long as deponents could recollect, there had been a custom in the town to elect a constable in a particular mode, but did not expressly state that they believed such custom to be immemorial:—Held, that it was not. *Rex v. Lane*, H. 2 and 3 G. 4, 488

CUSTOM-HOUSE OFFICERS.

See VENDOR AND VENDER, 3. PRACTICE, 27.

DAMAGES.

See PRACTICE, 27, 35.

DEBT.

See PRACTICE, 39.

DEED.

1. Where there were two assignments of the same lease of premises within the county of Middlesex, and that executed last was registered first: Held, that the deed last registered must, in a court of law, be considered as fraudulent and void, in consequence of 7 Ann. c. 20, s. 1, although the party claiming under the second assignment had full knowledge,

- when it was executed, of the prior execution of the first assignment. *Doe dem. Robinson v. Allsop*, M. 2 G. 4, 142
2. Where a defendant's ancestor came into possession of certain lands in 1752, as a creditor under a judgment obtained against the then owner of the land, and defendant's family had continued in possession ever since: Held, that the original possession having been taken, not under any conveyance, the length of possession was only *prima facie* evidence from which a jury might infer a subsequent conveyance by the original owner or some of his descendants; but that it might be rebutted, and that the jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed. *Doe dem. Fenwick and Others v. Reed*, M. 2 G. 4, 232
3. By a composition-deed, reciting that the insolvent was indebted in certain sums to J. P. for rent, to the crown for duties, to A. and B. upon judgment, and to the other creditors in the sums of money set opposite to their names in the schedule, the insolvent bargained and sold to trustees all his leasehold messuages, subject to certain mortgages, and all his personal estate whatsoever, upon trust to carry on the brewing and malting business, for the benefit of the creditors, and to collect outstanding debts, and to sell the farming stock, and out of the moneys arising from the sale of any part of the estate that should be mortgaged, to satisfy the mortgage, and to stand possessed of the residue upon trust to pay J. P. the rent due to him, the duties due to the crown, the rent which was, or thereafter should become due for any of the premises assigned, the interest upon the mortgages, then the judgment debt due to A. and B., then to pay all the creditors whose debts did not amount to 10*l.* in full, and at the expiration of nine months, to pay all the other creditors the amount of 5*s.* in the pound. There was a covenant by the creditors that they would release their respective claims to the insolvent. The indenture contained a proviso, that in case any creditor whose debt should amount to 100*l.*, or any two creditors whose debts should amount to 150*l.*, should not execute within three calendar months, the deed should be void. A. and B., the judgment creditors, whose debt exceeded 150*l.*, did not execute the deed within the time required: Held, that the deed was not thereby rendered void, the intention manifestly being, that those creditors only who were to receive a composition under the deed, were to execute it. *Wells v. Greenhill*, T. 3 G. 4, 869
- RENTS, together with the rents of all his other houses and lands unto his nephews and niece therein mentioned, for their lives and the life of the survivor; and after the decease of the survivor of them, he gave and devised all his houses and lands to trustees in trust to sell the same, and pay the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor; and then devised all the residue of his estate to C. B.: Held, that upon the death of the testator, the nephews and niece took an immediate estate for their lives and the life of the survivor, in the rents of all the houses and lands, except the house specifically bequeathed to C. B. for his life. *Doe dem. Annandale and Others v. Brazier*, M. 2 G. 4, 64
2. A. by his will, devised all his messuage or dwelling-house, with the appurtenances, in High Street, in the town of H., and all and every his buildings and hereditaments in the same street to his mother for life, and after her death to C. D. A. had only one house in the High Street, but behind that house he had two cottages fronting a lane, called Bake-House Lane. There was no thoroughfare through that lane, the only entrance into it being from the High Street: Held, that the two cottages passed under the will. *Doe dem. Humphreys v. Roberts*, H. 2 and 3 G. 4, 407
3. Where a testator bequeathed a burgrave tenement to his nephew, J. L., for life, and from and after his decease, to all and every the child and children of J. L. lawfully begotten, or to be begotten, whether sons or daughters, they, if more than one, to take, as tenants in common, in equal shares and proportions; and for want of such issue, to his own right heirs for ever: Held, that under this devise, J. L. took only an estate for life, and that after his death, his children took only estates for life as tenants in common. *Doe dem. Liveness v. Vaughan and Walker*, H. 2 and 3 G. 4, 464
4. By marriage settlement certain lands were limited to the husband for life, remainder to the wife for life, and remainder to their issue. Afterwards certain freehold land in the same parish descended to the husband in fee. There was no issue of the marriage, and the husband being in possession of the freehold lands under the settlement, and the other land of which he was seised in fee, devised to his wife for life all his freehold and copyhold lands of which he was then in the immediate possession, and also all his reversionary estate, expectant on the death of his mother, in certain other lands therein mentioned, and after the decease of his wife, he devised the same to his daughter in fee, and all other his real and personal estate he devised to his wife, her executors and administrators: Held, that the freehold land which the husband held under the settlement, passed under the particular devise in the will to the wife for life, and after her death to his daughter in fee, although the wife would have taken the same estate in those lands under the settlement. *Doe dem. Nethercote v. Bartle*, H. 2 and 3 G. 4, 492

DEVIATION.

See INSURANCE.

DEVISE.

See WILL, 1, 2.

1. A testator by his will bequeathed the rents of one dwelling-house situate in A. to C. B. for his life; and from and after the decease of the said C. B., he bequeathed the same

5. Devise of a mansion-house and lands to trustees upon trust until John Luscombe Manning should attain the age of 21 years, and then to him for life, he taking and using the testator's surname of Luscombe instead of his own surname, with limitations over to his first and other sons in strict settlement, they severally taking and using the testator's surname instead of their own. There were other limitations over to other persons. The will then contained a proviso, that when any of the premises thereby devised should vest in any person not bearing the surname of Luscombe, that person should, as soon as he should be in possession of the estate, take upon himself the name of Luscombe, and use the same as for and instead of his own surname, and should, within three years then next after, procure his own name to be altered to the testator's surname of Luscombe by act of parliament, or some other effectual way for that purpose, and in case any of the persons to whom the estate was limited, and who should be in possession of the same, should not take and use the testator's surname, but should neglect to get an act of parliament, or some other authority as effectual for that purpose as aforesaid, for the space of three years next after he should be in possession, that then the estate devised for the benefit of such persons so neglecting to get such act of parliament or other authority should cease, and become void, as if no such use or estate had been thereby devised; and the same should immediately, upon the expiration of the three years, go over to and vest in the person next in remainder or reversion, in the same manner as if such person so neglecting to change his surname was dead without issue, upon this express condition that such person so to take, did and should also take the testator's surname, and get an act of parliament or some other authority as effectual for that purpose, otherwise the estate was to go over. *J. L. Manning*, before he came of age, or entered into possession of the premises demised, took upon himself, used, and bore the surname of Luscombe and no other. But no act of parliament had ever been obtained authorizing him to change his name, nor was the king's license for that purpose obtained within three years after he so entered into possession: Held, that inasmuch as he bore the surname of Luscombe at the time when the estate came to him, he had substantially complied with the directions of the testator, and that he did not incur a forfeiture of that estate by not obtaining an act of parliament or other authority, the proviso only applying to persons not bearing the surname of Luscombe at the time when the estate vested in them. *Doe dem. Luscombe v. Yates and Others*, H. 2 and 3 G. 4, 544
6. Where a testator, after bequeathing a specific legacy, devised all and every other part of his real and personal estate to be equally divided between his three grandchildren, share and share alike for ever. And also, that if either of them should happen to die without child or children lawfully begotten, that then such part or share of the one so dying, should be equally divided amongst the surviving grandchildren; but, if any of his grandchildren should die and leave child or children lawfully begotten, that such child or children should have their parent's share equally divided amongst them, share and share alike: Held, that under this devise, the grandchildren took an estate in fee simple as tenants in common. *Clayton and Others v. Lowe*, E. 3 G. 4, 636
7. Where a testator, after devising his estates to his wife for life, bequeathed certain specific real property (which he described particularly) to each of his three daughters in fee, and then bequeathed the surplus remaining and book debts, ready money, moneys in the funds upon bond, and otherwise whatsoever, share and share alike, to be divided amongst his three daughters, to be paid them severally at 22, their equal share and the interest in the meantime, and in case either of them die before 22, or single, or before marriage, that the deceased's portion should be equally divided between the two survivors, share and share alike, or their heirs; and in case two died without heirs, that the whole should devolve to the survivor and her heirs. "in case no husband was living. If so, they enjoy the property during life only, and afterward her or their fortune goes to the heir or heirs of the survivor or survivors as heirs at law;" and that in case all his three daughters die without heirs and leave no husband living or at the decease of the said husband or husbands, certain legacies should be paid "out of the before mentioned estates;" and that all the residue of the estates should be sold and equally divided share and share alike amongst his (the testator's) brothers and sister: Held, that the latter devise extended both to the real and personal estate, and that the husbands of each of the daughters by necessary implication took an estate for life in the real property bequeathed to their respective wives. *Doe dem. Driver and Others v. Bowling*, E. 3 G. 4, 722
8. Devise to A. for 99 years, if he should so long live; remainder to his first son, then unborn, for 99 years, if he should so long live, and so on in tail male to such first son lawfully issuing for ever, and for want and in default of such issue of such first son, to the second and other sons successively for 99 years only, in case he should so long live; and that such elder son, or the issue of such elder son, should have no greater estate than for 99 years determinable at his decease; and if there should be no issue male of A. at the time of his (A.'s) death, or in case there should be such issue male at that time and they should all die before 21 without issue male, then to B. for 99 years, if he should so long live; remainder to the first son of B. for 99 years, if he should so long live, &c.: Held, that A. took under the will an estate for 99 years in the freehold estates, determinable with his life, and the same estate in the leasehold, if they should so long continue, and that, upon his death, his first son would take an estate for 99 years in the freeholds, determinable with his life, and the remainder

- of the terms in the leaseholds: but, that the limitations to the second and other unborn sons of A. were void as tending to perpetuity: and the limitations over to B., &c., after these void limitations, were not accelerated, but were void also. *Beard v. Westcott and Others*, T. 3 G. 4, 801
9. A testator devised certain estates to his daughter for life, and after her decease, to her son A. B. an infant, for life; and after the determination of that estate by forfeiture, or otherwise to trustees to preserve contingent remainders, but to permit A. B. to receive the profits during his life, and after the decease of A. B., then to the heirs of his body for ever with a devise over in case of the failure of his issue: Held that A. B. took an estate tail in remainder. *Measure v. Gee*, T. 3 G. 4, 910
10. R. Lowe by will devised all his landed estates to trustees, and bequeathed 10,000*l.* as a portion to his daughter C. L., but in case she should marry any one of his three kinsmen named in the will he gave to whichever of them she married, certain estates therein specified, he taking the name of Lowe and settling upon her an annuity of 1000*l.* a year during her life, and in case that circumstance did not take place with his daughter C. L., he then directed that it might be offered to his other daughter A. L. in every particular; and in case neither daughter should marry in the manner above mentioned, then he directed that his daughters should have 10,000*l.* each, and in that case he gave all his estates to W. D. his kinsman, for ever, on his and his heirs' taking the name of Lowe irrevocably. After the date of this will, C. L. married one W. H. who was not one of the persons named in the will, who would have become entitled to the estate after she married him, and the testator paid her a married portion; and afterwards by a codicil to his will reciting her marriage, and that he had given her a fortune, he revoked all devises and bequests in her favour contained in his original will, and also all claim which her husband W. H. might have to any of his real and personal estates by virtue of his marriage with his daughter C. L., and by virtue of his said will, and in lieu thereof, he bequeathed unto each of their children a pecuniary legacy; and he then directed, that in case his other daughter should marry either of the persons mentioned in his will, then upon condition, that either of those persons whom she married and his heirs would accept, take and use the name of Lowe only, he gave all his real and personal estate unto such of those persons whom she married, and his heirs; and in case his daughter A. L. should not marry either of the persons mentioned in his will, or if she married one of them, and he refused to accept, take, and use the name of Lowe, in that case he revoked all his devises and bequests contained in his will and codicil in her favour, and in lieu thereof bequeathed her 10,000*l.* The testator died soon after the date of his codicil, and his daughter A. L. afterwards married T. F., who was not one of the persons named in the will, who would have been entitled to the estate in the event of her having married him, and upon that occasion, the 10,000*l.* was paid to her, and W. D. then entered upon the testator's estates, and took upon himself the name of Lowe, and suffered a recovery: Held, that W. D. was seised of an indefeasible estate in fee simple in the estate in question. *Lowe v. Sir William Manners, Baronet*, T. 3 G. 4, 917

DISTRESS.

See LANDLORD AND TENANT, 2. LEASE, 2.

DOWER.

Certain lands were conveyed to A. B., his heirs and assigns, to such uses as C. D. should by deed appoint; and in default of, and until appointment, to the use of C. D. in fee. C. D. afterwards, in execution of the power by deed duly made an appointment of the said estates in favour of E. F. in fee. C. D., at the time of making the appointment, was married. His wife was held not to be dowerable out of these lands. *Ray v. Fung*, E. 3 G. 4, 561

ECCLESIASTICAL COURT, JURISDICTION OF.

See WARRANT, L.

EJECTMENT.

1. The growing crops of a tenant having been seized under a *fi. fa.*, a writ of *hab. fac. poss.* was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord founded on a demise made long before the issuing of the *fi. fa.* Held, that the sheriff was not bound to sell the growing crops under the *fi. fa.* inasmuch as they could not in point of law be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration: Held, also, that the sheriff had no right to allow to the landlord a year's rent, under the statute of 8 Ann. c. 14, that statute contemplating an existing tenancy, which in this case must be taken to have ceased on the day of the demise in the ejectment. *Hodgson and Others, Assignees of Seaton, v. Gascoigne*, M. 2 G. 4, 88
2. The declarations of a widow in possession of premises, that she held them for her life, and that after her death they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had twenty years' adverse possession. *Doe dem. Human v. Pettitt*, M. 2 G. 4, 223
3. Where a defendant's ancestor came into possession of certain lands in 1752, as a creditor under a judgment obtained against the then owner of the land, and defendant's family had continued in possession ever since: Held, that the original possession having been taken, not under any conveyance, the length of possession was only *prima facie* evidence from which a jury might infer a subsequent conveyance by the original owner or some of his descendants, but that it might be rebutted, and that the jury must not presume such conveyance from length of possession,

unless they were satisfied that it had actually been executed. *Doe dem. Fenwick and Others v. Reed*, M. 2 G. 4, 232

4. Where a rule has been obtained for staying the proceedings in ejectment, till the costs of a former ejectment have been paid, the Court will not interfere, and permit the defendant, in case those costs are not paid before a certain day to be named by the Court to non pros. the ejectment pending. *Doe dem. Sutton v. Ridgway*, H. 2 and 3 G. 4, 523
5. Where a copyholder has been admitted to a tenement and done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture from showing that the legal estate was not in the lord at the time of admittance. *Doe dem. Nepean, Bart., v. Budden*, E. 3 G. 4, 626
6. The notice to the tenant in possession at the foot of the declaration in ejectment, need not be in the name of the plaintiff; but, if in the name of the lessor of the plaintiff, or even any other person, the Court will permit the rule for judgment against the casual ejector to be drawn up. *Goodtitle dem. Duke of Norfolk v. Notidle*, T. 3 G. 4, 849

EMANCIPATION.

1. A pauper being eighteen years of age, and residing with his father, was drawn as a militia-man, and served for five years as a balloted man. During his service he, several times when on furlough, and finally after his discharge from the militia, returned to his father's house: Held, that by his so remaining separated from his father's family after twenty-one, he was emancipated, although the original separation was not voluntary on his part. *Rev v. The Inhabitants of Hardwick*, M. 2 G. 4, 176
2. During the minority of a child there can be no emancipation, unless he marries, and so becomes himself the head of a family, or contract, some other relation, so as wholly and permanently to exclude the parental control. *Semble*, that the acquiring a settlement of his own does not properly constitute an emancipation. *Rev v. The Inhabitants of Wilmington*, H. 2 and 3 G. 4, 625

ESTOPPEL.

See RELEASE, 1. PLEADING, 25.

ESTREAT.

See PRACTICE, 19.

EVIDENCE.

1. Declaration stated, that in consideration that plaintiff would assign to the defendant a bill of exchange, defendant undertook, &c., and then averred that plaintiff did assign the bill. It appeared that the parties had agreed that the plaintiff should give up the bill to the defendant, the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff by deed assigned to the defendant, the bill and all sums of money due thereon, to and for the defendant's own use; and the defend-

ant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill: Held, that the declaration imported, that the plaintiff had made an absolute assignment of the bill, and consequently, that the assignment in evidence being only conditional, this was a fatal variance. *Vaneandau v. Burt*, M. 2 G. 4, 42

2. In trespass, the first count of the declaration stated, that defendant assaulted and imprisoned plaintiff; and, during such imprisonment, struck, pulled, and pushed him about; justification, that defendant arrested plaintiff under process of court, and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c.: Held, that this latter part of the justification not being proved, the plaintiff was entitled to judgment, and that it was not necessary to new assign the battery by the defendant. Held, also, that the second count of the declaration (which omitted the battery) having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses as laid in the first count. *Phillips v. Hosgate*, M. 2 G. 4, 220
3. The declarations of a widow in possession of premises, that she held them for her life, and that after her death they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had twenty years' adverse possession. *Doe dem. Human v. Pettett*, M. 2 G. 4, 223
4. Where a defendant's ancestor came into possession of certain lands in 1752, as creditor under a judgment obtained against the then owner of the land, and defendant's family had continued in possession ever since: Held, that the original possession having been taken, not under any conveyance, the length of possession was only *prima facie* evidence from which a jury might infer a subsequent conveyance by the original owner or some of his descendants, but that it might be rebutted, and that the jury must not presume such conveyance from length of possession, unless they were satisfied that it had actually been executed. *Doe dem. Fenwick v. Reed*, M. 2 G. 4, 232
5. Where an assignment of a lease by deed, taken in execution, was made in the name and under the seal of office of the sheriff, by A. B., acting as under-sheriff: Held, that such assignment was sufficiently proved, without proving further the appointment of A. B. as undersheriff, and that he had power by deed to execute deeds in the name of the sheriff. *Doe dem. James v. Brawn*, M. 2 G. 4, 243
6. An issue having been directed to satisfy the Court as to the forgery of a signature to a warrant of attorney, a verdict was found, establishing the genuineness of it, upon evidence satisfactory to the Judge who tried the cause, and to the Court upon his report of it. In the course of the trial, an inspector of franks, who had never seen the party write, was called to prove, from his knowledge of handwriting in general, that the signature

- in question was not genuine, but an imitation; this evidence having been rejected, the Court refused to disturb the verdict on the ground that such evidence, even if admissible, was entitled to very little weight, and that the issue being to satisfy the Court, a new trial ought not to be granted, unless for the rejection of evidence which might reasonably have altered the verdict. *Quære*, if such evidence be admissible at all. *Gurney v. Langlands*, H. 2 and 3 G. 4, 330
7. An estate in fee, upon the determination of a life estate, was devised to the wife of A. B. A. B. was one of the attesting witnesses to the will. The testator died in 1779, and the wife of A. B. died in 1813, before the previous life estate was determined: Held, that A. B. was not a good attesting witness to this will. *Hatfield v. Thorp*, E. 3 G. 4, 589
8. Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of the third person, speaking of the plaintiff's conduct, and the declaration in setting it out, had omitted those references: Held, that these omissions altered the sense of the remainder, and that the variance was fatal. *Carterwright v. Wright*, E. 3 G. 4, 615
9. Where a copyholder has been admitted to a tenement, and done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture, from showing that the legal estate was not in the lord at the time of admittance. *Doe dem. Nepean v. Budden*, E. 3 G. 4, 626
10. To an action on a bill of exchange the defendant pleaded non assumpsit to all but a part, and as to that part a tender. Replication, that after the cause of action accrued, and before the tender, the plaintiff demanded the smaller sum: Held, that this issue would only be supported by proof of the demand of the precise sum tendered. *Rivers v. Griffiths*, E. 3 G. 4, 630
11. A petition, addressed by a creditor of an officer in the army to the secretary at war, bona fide and with a view of obtaining, through his interference, the payment of a debt due, and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel for which an action is maintainable. In such an action, even upon the general issue, evidence may be received to show that the writer bona fide believed the facts stated in the petition to be true. *Fairman v. Joss*, E. 3 G. 4, 642
12. A bill against an attorney was filed of Michaelmas term, and appeared by the memorandum to have been filed on the 28th November: Held, that evidence was admissible to show that it was actually filed on the 24th December: Held, also, that a demand and refusal is evidence of a prior conversion; and, therefore, where deeds were in defendant's possession prior to Michaelmas term, and the demand and refusal proved were on the day after that term, it was held, that this was evidence of a conversion before the term. *Wilton v. Girdlestone*, T. 3 G. 4, 847
13. Where premises had been demised by two tenants in common, and the rents for a time

paid to the agent of both, but afterwards the tenant had notice to pay a moiety of the rent to each of the two, and the rent was so paid accordingly, and separate receipts given: Held, that it then became a question of fact for a jury to say, whether it was the intention of the parties to enter into a new contract of demise, with a separate reservation of rent to each. *Powis v. Smith*, T. 3 G. 4, 850

EXECUTION.

See *FIERI FACIAS*.

EXECUTOR.

The property of a deceased person vests in his executor from the time of his death, in an administrator, from the time of the grant of the letters of administration; and, therefore, where A. took out letters of administration under a will, by which he was appointed executor; and after notice of a subsequent will, sold the goods of the testator: Held, that the rightful executor in an action of trover was entitled to recover the full value of the goods sold, and A. was not entitled, in mitigation of damages, to show that he had administered the assets to that amount. *Woolley, Executor, v. Clark*, E. 3 G. 4, 744

EXECUTORY DEVISE.

See *DEVISE*, 8.

EXTRA-PAROCIAL DISTRICT.

See *SETTLEMENT*, 4.

FACTOR.

The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale; the factor being also similarly indebted to I. S., sold the goods to him. The factor afterwards became bankrupt; and, on a settlement of accounts between I. S. and the assignees, I. S. allowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner.

By 47 G. 3, sess. 2, c. 28, s. 29, "All contracts for coals are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of the market." A factor having coals consigned to him for sale by A., sold the same, and entered the contract in his book as having been made for C., the master of the ship. It was not signed by the purchaser; but, in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, was inserted; the factor had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. *Quære*, whether, under the

circumstances, an action might be brought in the name of C. for the price of the coals. *Hudson v. Granger*, M. 2 G. 4, 27

FEME COVERT.

See COPYHOLD, 1. PRACTICE, 23.

FIERI FACIAS.

1. The growing crops of a tenant having been seized under a f. fa., a writ of hab. fac. poss. was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord founded on a demise made long before the issuing of the f. fa.: Held, that the sheriff was not bound to sell the growing crops under the f. fa., inasmuch as they could not in point of law be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration. *Hodgson v. Gascogne*, M. 2 G. 4, 88
2. A sheriff has no right, under a f. fa., to seize fixtures, where the house in which they are situated is the freehold of the person against whom the execution issues. *Winn v. Ingleby, Bart., and Another*, E. 3 G. 4, 625

FINE.

See MORTGAGOR AND MORTGAGEE, 2.

By marriage settlement, dated December, 1806, certain manors and lands were limited to the husband for life, remainder to the wife for life, remainder to the use of the first and other sons of the marriage successively in tail male; remainder in case the wife should survive the husband, to her in fee; but if she should die in the lifetime of her husband, remainder to the daughters successively in tail male; remainder to the use of such persons related by blood or consanguinity, and in such estates or interests, and in such manner, and charged with such sums of money in favour of such persons so related, as she by her will might appoint; and in case of no such appointment, to her in fee. The settlement also contained a power for the trustees there named, at the request, and by the direction of the husband and wife, or the survivor, to sell or exchange the settled estates, and for that purpose, to revoke all and any of the uses contained in the settlement; and also a covenant by the husband for further assurance on his part, and that of his wife, and all persons claiming under him. In pursuance of this settlement, certain fines were levied. By deed, dated March, 1807, reciting the settlement, and the fines levied in pursuance thereof, and the limitations therein contained, and further, that the wife was desirous of acquiring an absolute power of appointment over the manors, &c., comprised in the settlement, in the event of her surviving, or dying in the lifetime of her husband, and there being a general failure of issue of her body, inheritable to the manors, &c., under the settlement, the husband and wife covenanted to levy certain fines, surconscience de droit come ceo, with proclamations, to J. G. and his heirs, of all the manors, &c., comprised in the settlement: which fines were

to operate, and to be taken to operate, first, for corroborating the uses contained in the settlement antecedently to the limitations of the use of the wife in fee-simple, and subject thereto to the use of such persons, &c., as the wife by will or deed might appoint. In pursuance of this latter deed, several fines come ceo were levied by the husband and wife: Held, that, under these circumstances, these latter fines did not operate to extinguish, destroy, or suspend the right or power of the husband and wife, and the survivor of them, to request and direct a sale or exchange of the settled estates under the powers for that purpose contained in the settlement, so as to prevent an exercise of those powers by the trustees. *The Earl and Countess of Jersey and Others v. Deane*, E. 3 G. 4, 569

FIXTURES.

A sheriff has no right under a f. fa. to seize fixtures, where the house in which they are situated is the freehold of the person against whom the execution issues. *Winn v. Ingleby*, E. 3 G. 4, 625

FORFEITURE.

See COPYHOLD, 2.

Devise of a mansion-house and lands to trustees upon trust until John Luscombe Manning should attain the age of 21 years, and then to him for life, he taking and using the testator's surname of Luscombe instead of his own surname, with limitations over to his first and other sons in strict settlement, they severally taking and using the testator's surname instead of their own. There were other limitations over to other persons. The will then contained a proviso, that when any of the premises thereby devised should vest in any person not bearing the surname of Luscombe, that person should, as soon as he should be in possession of the estate, take upon himself the name of Luscombe, and use the same as for and instead of his own surname, and should, within three years then next after, procure his own name to be altered to the testator's surname of Luscombe by act of parliament, or some other effectual way for that purpose, and in case any of the persons to whom the estate was limited, and who should be in possession of the same, should not take and use the testator's surname, but should neglect to get an act of parliament, or some other authority as effectual for that purpose as aforesaid, for the space of three years next after he should be in possession, that then the estate devised for the benefit of such persons so neglecting to get such act of parliament or other authority should cease, and become void, as if no such use or estate had been thereby devised; and the same should immediately, upon the expiration of the three years, go over to and vest in the person next in remainder or reversion, in the same manner as if such person so neglecting to change his surname was dead without issue, upon this express condition that such person so to take, did and should also take the testator's surname, and get an act of par-

liament or some other authority as effectual for that purpose, otherwise the estate was to go over again. *J. L. Manning*, before he came of age, or entered into possession of the premises demised, took upon himself, used, and bore the surname of Luscombe and no other. But no act of parliament had ever been obtained authorising him to change his name, nor was the king's license for that purpose obtained within three years after he so entered into possession: Held, that inasmuch as he bore the surname of Luscombe at the time when the estate came to him, he had substantially complied with the directions of the testator, and that he did not incur a forfeiture of that estate by not obtaining an act of parliament or other authority, the proviso only applying to persons not bearing the surname of Luscombe at the time when the estate vested in them. *Doe dem. Luscombe v. Yates and Others*, H. 2 and 3 G. 4, 544

FOREIGN ATTACHMENT.

The 19 G. 3, c. 70, s. 4, is confined to those suits in inferior courts where the proceedings are similar to those in the superior courts; and, therefore, does not extend to the case of a foreign attachment. *Bulmer v. Marshall*, T. 3 G. 4, 821

FRAUDS, STATUTE OF.

1. The agent contemplated by the 17th sect. of the statute of frauds, who is to bind a defendant by his signature, must be a third person, and not the other contracting party; and, therefore, where an auctioneer wrote down the defendant's name by his authority opposite to the lot purchased: Held, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the statute. *Farebrother v. Simmonds*, H. 2 and 3 G. 4, 353
2. A., a merchant in London, had been in the habit of selling goods to B., resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B. by the first ship. In pursuance of a parol order from B., goods were delivered to and accepted by the wharfinger to be forwarded in the usual manner: Held that this, not being an acceptance by the buyer, was not sufficient to take the case out of the 29 Car. 2, c. 3, s. 17. *Hanson and Another v. Armitage*, H. 2 and 3 G. 4, 557
3. An estate in fee, upon the determination of a life estate, was devised to the wife of A. B.; A. B. was one of the attesting witnesses to the will. The testator died in 1779, and the wife of A. B. died in 1813, before the previous life estate was determined: Held, that A. B. was not a good attesting witness to this will. *Hayfield v. Thorp*, E. 3 G. 4, 589
4. Where there was a verbal contract by the plaintiffs, who were millers, for the sale of a quantity of flour, which, at the time, was not prepared, and in a state capable of immediate delivery: Held, that this was a contract for the sale of goods within 29 Car. 2, c. 3, s. 17. *Garbutt v. Watson*, E. 3 G. 4, 613
5. A horse was sold by verbal contract, but no

time was fixed for the payment of the price. The horse was to remain with the vendor for twenty days without any charge to the vendee. At the expiration of that time the horse was sent to grass by the direction of the buyer, and by his desire entered as the horse of one of the vendors: Held, that there was no acceptance of the horse by the vendee within 29 Car. 2, c. 3, s. 17. *Carter v. Toussaint*, T. 3 G. 4, 854

FREEHOLD.

See FIXTURES, I.

FRIENDLY SOCIETIES.

See PLEADING, 27.

GAME.

In order to constitute the offence of keeping a setting dog within the 5 and 6 Anne, c. 14, s. 4, the dog must be kept for the purpose of killing and destroying game; and, therefore, where it appeared that at the time when the alleged offence was charged to have been committed, the dog was tied up, and never went out into the field with its master, this was held not to be an offence within the statute. *Hayward v. Horner*, H. 2 and 3 G. 4, 317

HABEAS CORPUS.

See PRACTICE, 20.

HARBOUR DUES.

An act of parliament, imposing a tonnage duty on vessels coming into the harbour of Dover, contained an exception of all vessels employed in his majesty's service: Held, that a vessel hired by the postmasters-general to carry the mails and government dispatches to and from Dover to Calais, &c., the master of which was permitted to carry passengers and their luggage, and bullion, upon freight, is a vessel coming within the exception. *Hamilton v. Stow*, E. 3 G. 4, 649

HIGHWAY.

See INCLOSURE ACT, 4.

Two magistrates authorized the surveyor of a turnpike road which ran through twenty-nine townships, to collect for the repair of the road a composition in lieu of the statute duty. The surveyor was not examined upon oath as to the necessity of the composition. He afterwards made an assessment of sixpence in the pound upon the annual value of the lands of a particular township through which the turnpike road passed. The sum to be collected under the assessment was the utmost which the surveyor of the turnpike roads could in any case demand from the inhabitants of the township, and much exceeded what was required to put that part of the road lying in the township into complete repair. The turnpike surveyor having returned the assessment to the surveyor of the highways of the township, directed him to collect the sums therein mentioned. Upon a refusal

to pay the sum assessed by an inhabitant of the township, two magistrates granted a warrant of distress to levy the same: Held, that the warrant was bad, the magistrates having no jurisdiction whatever, upon the ground that, in order to legalise the demand under the assessment, it ought to have been previously ascertained how many days' statute duty would be required to put the road into complete repair, the composition being demandable only in respect of that number of days' statute duty.

Semble, that in order to justify magistrates in granting an authority to collect a composition in lieu of statute duty, it should be made to appear upon oath, to both the magistrates present, that the road can be more effectually repaired by such composition.

Semble, also, that where the composition is to be collected in several townships, it ought to appear on the face of the authority itself, that, in the judgment of the magistrates, a composition, in lieu of statute duty, is advisable in each particular township. *Stanley, Bart., v. Fielden and Others*, H. 2 and 3 G. 4, 425

INCLOSURE ACT.

1. A., having purchased an estate free from rectorial tithes, with a right of common thereto annexed; the common was afterwards enclosed under an act of parliament, and certain land was allotted to A. in lieu of his said right of common: Held, that no tithe was payable in respect of the allotted land. *Steele v. Manns*, M. 2 G. 4, 22

2. An enclosure act empowered the commissioners to make a rate to defray the expenses of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners. Expenses were incurred in the execution of the act before any rate was made. To defray these expenses the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned, on account of the public drainage, and to place the same to their account, as commissioners. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts: Held, that the commissioners were personally responsible to the bankers for the drafts so made.

The latter having from time to time made half-yearly rests in the account, and charged interest upon the balance then struck, and the commissioners having assented to that mode of keeping the accounts, it was held, that this mode of charging of interest half-yearly was not unlawful on the ground of usury. *Eaton and Others v. Bell*, M. 2 G. 4, 34

3. By an enclosure act it was enacted, that the commissioners should set out, allot, and award certain portions of lands out of the commons to be enclosed, unto the impropriate rectors and curate, in lieu of all great and vicarial tithes; and the commissioners were required to distinguish by their award the several allotments to the impropriate rectors and curate respectively, and the same allotments

were thereby declared to be in full satisfaction and discharge of all tithes: Held, under this act, that the tithes were not extinguished until the commissioners made their award. *Ellis v. Arnison*, M. 2 G. 4, 47

4. By a clause in an enclosure act, a commissioner was authorised to stop up any way, provided it be done by the order, and with the concurrence of two justices, and that order was to be subject to an appeal in like manner, and under such form and restrictions, as if the same had been originally made by such justices. By a subsequent clause, any party aggrieved was to be at liberty to appeal at any time within six months after the cause of complaint. Under this act the commissioner, with the concurrence and order of two justices, stopped up a road, without giving the public notices required by the 55 G. 3, c. 68: Held, that a party aggrieved might, under these circumstances, appeal at any time within six months. Quere, whether it be necessary to give such notices where roads are stopped up under the provisions of an enclosure act. *Rex v. Townsend*, H. 2 and 3 G. 4, 420

INDICTMENT.

See CRIMINAL INFORMATION, 3.

INFANT.

1. An infant cannot be appointed to the office of clerk of a court of requests, where it is part of the duty of the officer to receive the money of the suitor. *Claridge v. Evelyn and Others*, M. 2 G. 4, 81

2. Where an infant held himself out as in partnership with I. S., and continued to act as such till within a short period of his coming of age; but there was no proof of his doing any act as a partner after twenty-one: Held, that it was his duty to notify his disaffirmance of the partnership on arriving at twenty-one; and as he had neglected to do so, that he was responsible to persons who had trusted I. S. with goods, subsequently to the infant's attaining twenty-one, on the credit of the partnership. *Goode and Bennion v. Harrison (in error)*, M. 2 G. 4, 147

3. Where judgment of nonsuit had been given in an action brought against an infant, it is no ground of error that the infant had appeared by attorney. *Bird v. Pegg*, H. 2 and 3 G. 4, 418

INSOLVENT ACT.

See PRACTICE, 26.

INSURANCE.

See COVENANT, 1.

1. By a policy, a ship was insured at and from Hull to her port or ports of loading in the Baltic Sea and Gulf of Finland, with liberty to proceed to and touch and stay at, any port or ports whatsoever, for any purpose, particularly at Elsinore, without being deemed a deviation. The ship touched and stayed at Elsinore and Dantsic, to deliver goods, Pillau being her port of loading: Held, that

- this was a deviation. *Solly and Another v. Whitmore*, M. 2 G. 4, 45
2. A policy was effected on living animals, warranted free from mortality and jettison. In the course of the voyage, some of the animals, in consequence of the agitation of the ship in a storm, were killed; and others, from the same cause, received such injury that they died before the termination of the voyage insured: Held, that this was a loss by a peril of the sea, for which the underwriters were liable. *Lawrence v. Aberdeen*, M. 2 G. 4, 107
 3. Where, in an action on a policy of insurance on ship, in the usual form, for twelve months, at sea and in port, the loss averred was as follows: that the ship having arrived at the harbour of St. J., and discharged her cargo, it became necessary to place her, and she was accordingly placed, in a graving-dock, there to be repaired, and near to a certain wharf, in the graving-dock: and that, whilst she was there, by the violence of the wind and weather, she was thrown over on her side, whereby she struck the ground with great violence, and was bilged, &c.: Held, that this was a loss within the general words of the policy, "all other perils, losses, and misfortunes, &c.," for which the underwriters were liable. Held, also, that the above facts, with the additional circumstance of there being two or three feet water in the graving-dock when the accident happened, did not amount to a loss by perils of the sea. *Phillips and Another v. Barber*, M. 2 G. 4, 161
 4. The underwriters on a policy of insurance are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners. *Walker v. Maitland*, M. 2 G. 4, 171
 5. Where, during the course of a voyage upon an inland navigation, it became necessary, in order to repair the navigation, to draw off the water; and the ship, in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, went by accident upon some piles, which were not previously known to be there: Held, that this was a stranding within the usual memorandum in the policy, the accident having happened not in the ordinary course of such voyage. *Raynor v. Godmond*, M. 2 G. 4, 225
 6. Insurance from London to Jamaica generally. The goods insured were destined to a particular place in the island, and the usual course in such cases was for the ship to proceed to an adjoining port, and there to tranship the cargo into shallows; but no information of this was given to the underwriters: Held, notwithstanding, that they were liable for a loss occurring after such transhipment on board the shallows. *Stewart v. Bell*, M. 2 G. 4, 238
 7. Where a ship and cargo was barratrously taken out of her course by the crew, and the ship and part of the cargo sold, and the remainder sent home by another vessel: Held, that this was a total loss of the cargo from the time of the commitment of the act of barratry. *Dixon v. Reid*, E. 3 G. 4, 597

INTEREST.

See ADMINISTRATOR, 1.

IRISHMAN.

See SETTLEMENT, 3.

JUDGES' CERTIFICATE.

See PRACTICE, 32.

JURISDICTION.

See JUSTICES, 1, 2.

JUSTICES.

1. It is not necessary, in order to give the justices at sessions jurisdiction to hear an appeal against overseers' accounts, that such accounts should previously have been examined and allowed, pursuant to 50 G. 3, c. 49. *Rex v. The Justices of Colchester*, H. 2 and 3 G. 4, 535
2. The proviso in 55 Geo. 3, c. 51, s. 1, stating that that act shall not give any jurisdiction to the justices of the county over any places situate within the limits of any liberties or franchises having a separate jurisdiction, is confined to franchises having a separate jurisdiction co-extensive with that possessed by the county justices; and, therefore, where the justices of the city of B. had no jurisdiction by charter to try felons, it was held that the city of B. was liable to the county rate. *Rex v. Clarke*, E. 3 G. 4, 665
3. An order of sessions for levying and paying to the treasurer of the county a sum to enable him to reimburse certain persons for an antecedent debt, although such debt had been incurred for county purposes, is bad. *Rex v. The Justices of Flintshire*, E. 3 G. 4, 761

LANDLORD AND TENANT.

1. The growing crops of a tenant having been seized under a *fi. fa.*, a writ of *hab. fac. poss.* was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord founded on a demise made long before the issuing of the *fi. fa.* Held, that the sheriff was not bound to sell the growing crops under *fi. fa.*, inasmuch as they could not in point of law be considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration: Held, also, that the sheriff had no right to allow to the landlord a year's rent, under the statute of 8 Ann. c. 14, that statute contemplating an existing tenancy, which in this case must be taken to have ceased on the day of the demise in the ejectment. *Hodgson v. Gascoigne*, M. 2 G. 4, 88
2. A landlord has no right to distrain, unless there be an actual demise to the tenant at a fixed rent; and, therefore, where a tenant was in possession, under a memorandum of agreement to let on lease, with a purchasing clause, for 21 years, at the net clear rent of 63*l.*, the tenant to enter any time on or before a particular day: Held, that this only amounted to an agreement for a future lease, and that no lease having been executed, and

- no rent subsequently paid, the landlord was not entitled to distrain. *Dank v. Hunter*, H. 2 and 3 G. 4. 322
3. A covenant by a lessee, that he will sufficiently muck and manure the land with two sufficient sets of muck, within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenant's laying on two sets of muck within the three last years of the term. *Pownall v. Moores*, H. 2 and 3 G. 4. 416
4. Where by a local act, it was provided that a drainage tax should be paid by the tenants of the lands and grounds charged with the same, who might deduct and retain the same out of the rents payable to their landlord. And also, that in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrear, and if the same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a surety for the payment thereof, and might be taken possession of, and let in discharge of the tax; Held, that the tenants to be charged with the tax, were those in whose time the tax accrued due, and not the tenants for the time being. And, therefore, where an outgoing tenant having paid his rent in full, had left property on the premises, which was afterwards distrained for the tax due during his tenancy, and he was obliged to pay it: Held, that he might recover the same in an action against his landlord for money paid. *Dawson v. Linton*, H. 2 and 3 G. 4. 521
5. Where a copyholder has been admitted to a tenement, and done fealty to the lord of a manor, he is estopped in an action by the lord for a forfeiture, from showing that the legal estate was not in the lord at the time of admittance. *Doe dem. Nepean v. Budden*, E. 3 G. 4. 626
6. A tenancy by virtue of an agreement in writing for three months certain, is a tenancy "for a term" within the meaning of the 1 G. 4, c. 87. *Doe dem. Phillips v. Roe*, E. 3 G. 4. 766
7. Where a tenant holds from year to year, but without a lease or agreement in writing, it is not a case within 1 G. 4, c. 87, s. 1. *Doe dem. Earl of Bradford v. Roe*, E. 3 G. 4. 770
8. Where certain mill-machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill; and it was afterwards seized under a *f. fa.* by the sheriff, and sold by him: Held, that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during the continuance of the term. *Farrant v. Thompson*, T. 3 G. 4. 826
9. By lease granted in 1814, and to take effect from 1820, certain houses, together with a piece of ground which was part of an adjoining yard, were leased to a tenant, together with all ways with the said premises or any part thereof used or enjoyed before. At the time of granting the lease, the whole of the yard was in the occupation of one person, who had always used and enjoyed a certain right of way to every part of that yard: Held, that the lessee was entitled to such right of way to the part of the yard demised to him. *Kooystra v. Lucas*, T. 3 G. 4. 830
10. Where premises had been demised by two tenants in common, and the rent for a time paid to the agent of both, but afterwards the tenant had notice to pay a moiety of the rent to each of the two, and the rent was so paid accordingly, and separate receipts given: Held, that it then became a question of fact for a jury to say, whether it was the intention of the parties to enter into a new contract of demise, with a separate reservation of rent to each. *Powie v. Smith*, T. 3 G. 4. 850
11. Two messuages were conveyed to such uses as A. should appoint, and in default of appointment to A. for life, and after the determination of that estate in his lifetime to B. for the life of A., in trust for A. and his assigns; with remainder to A. in fee. A. leased both these messuages to a tenant at an entire rent of 65*l.* 10*s.* for a term of years, and during the continuance of that term, contracted to sell the reversion of one of the messuages to C. In the contract the message was described on lease, together with another, and that the apportioned rent in respect of it was 40*l.* A. and B. afterwards conveyed the reversion of both houses, and the entire rent of 65*l.* 10*s.* unto C. to certain uses, viz. as to the said message which A. had contracted to sell, and the yearly rent of 40*l.*, together with all powers and remedies reserved for recovering the rent of 65*l.* 10*s.* to such uses as A. should appoint; and as to the other message and the residue of the entire rent, to the use of A. in fee. A. afterwards appointed the message which he had contracted to sell, and the apportioned rent to the vendee: Held, that the latter did not acquire the same rights and remedies against the lessee as he would have acquired if the rent had been legally apportioned by a jury, the lessee for the term not being bound by an apportionment made without his consent. *Bliss v. Collins*, T. 3 G. 4. 876

LEASE.

1. Where there were two assignments of the same lease of premises within the county of Middlesex, and that executed last was registered first: Held, that the deed last registered must, in a court of law, be considered as fraudulent and void, in consequence of 7 Ann. c. 20, s. 1, although the party claiming under the second assignment had full knowledge, when it was executed, of the prior execution of the first assignment. *Doe dem. Robinson v. Allcop*, M. 2 G. 4. 142
2. By a private act passed in the year 1720, certain estates were settled in strict settlement, and a power was reserved to the respective tenants in tail, by deed, to lease any part of the lands thereby settled, "for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of

three lives, so as upon every such lease there be reserved, and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, boons, and services for the same; and, so as there be contained therein, a condition of re-entry for non-payment of the said rent, and rents thereby to be reserved." By lease, dated the 6th January, 1785, a tenant in tail of the said estates demised a part of the premises thereby, settled to hold from the date of the lease for ninety-nine years, if three persons therein named should so long live, yielding and paying yearly and every year during the said term, unto the lessor, the yearly rent of 50*l*. upon the 25th March and 29th September, by even and equal portions, the first payment to be made on the 25th of March ensuing the date of the lease. There was a proviso that, if the rent should not be paid on those days, or if certain amerçiaements and fines therein mentioned, after reasonable demand, should not be paid, it should be lawful for the lessor, his heirs and assigns, to re-enter and distrain, and the distress to take away, detain, and keep, until the rent be satisfied; and there was the following proviso for a re-entry: "that in case the said yearly rent should be unpaid for the space of twenty-eight days after it became due, being lawfully demanded, it should be lawful for the lessor, his heirs and assigns, to re-enter."

Previous to the time of passing the act, the premises demised by this lease had been demised jointly with other premises by the settlor's ancestor, by a lease bearing date 2d February, 1708, "for ninety-nine years, determinable upon three lives, at a yearly rent of 82*l*. payable on the same days as those mentioned in the lease of the 6th January, 1785, and the first payment to commence on the 25th March ensuing the date of the lease." It contained also a similar power for the lessor to distrain, and a power of re-entry, upon the rent being behind for twenty-eight days, upon its being lawfully demanded, and not paid, and no sufficient distress being found upon the premises. It did not appear whether any other lease was granted between that period and the year 1756. At that time another lease of the premises, demised by the lease of the 6th January, 1785, was granted at a rent of 32*l*. payable at the same period as in the other leases, containing the same powers of distress and re-entry for non-payment of rent as those in the lease of the 6th January, 1785:

Held, first, that it was not a valid objection to the lease of the 6th January, 1785, that the rent was made payable on the 25th March and 29th September, (although the term commenced on the 6th January, and that therefore there was a forehand rent, which might prejudice the remainder-man,) inasmuch as the rent was made payable on the same days by the former lease, and, therefore, this was the usual and accustomed rent:

Held, secondly, for the same reason, that it was no objection to the lease that the rent was made payable by half-yearly payments,

although the power required it to be payable yearly; the word *yearly* meaning a payment of rent in the year:

Held, thirdly, that it was no objection to the lease, that by the terms of it the landlord could distrain only after a reasonable demand, and that he was bound to detain the distress until the distress was satisfied; for this being a clause introduced for his benefit, he was not thereby abridged of any right of distress which he had by common law, or of sale, under the statute 4 and 5 W. & M.:

Held, fourthly, that it was no objection to this lease, that the clause of re-entry reserved the right of entry to the landlord upon the rent being twenty-eight days in arrear, for this was a reasonable condition of re-entry, and was conformable to the old lease. Nor was it any objection that the right of entry was made to depend upon the rents being lawfully demanded, for the landlord was not thereby deprived of the benefit of the 4 G. 2, c. 28, and consequently was entitled by that statute to enter without making any demand:

Held, also, that part of the premises formerly demised jointly with others at one entire rent, might be let under the terms of this power at a rent bearing the same proportion to the old rent, that the premises demised by the lease bore to the whole premises formerly demised. *Doe dem. Earl of Shrewsbury v. Wilson*, H. 2 and 3 G. 4, 363

3. A covenant by a lessee that he will sufficiently muck and manure the land with two sufficient sets of muck within the space of six of the last years of the term, the last set of muck to be laid upon the premises within three years of the expiration of the term, is satisfied by the tenants laying on two sets of muck within the three last years of the term. *Pownall v. Moores*, H. 2 and 3 G. 4, 416

LIBEL.

1. The Court will grant a criminal information for a libel upon a public body of men upon an affidavit, stating the publication of the libel by the defendant. *Rez v. Williams*, E. 3 G. 4, 595
2. Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of the third person, speaking of the plaintiff's conduct, and the declaration, in setting it out, had omitted those references: Held, that these omissions altered the sense of the remainder, and that the variance was fatal. *Cartwright v. Wright*, E. 3 G. 4, 615
3. A petition, addressed by a creditor of an officer in the army to the secretary at war, bona fide and with a view of obtaining, through his interference, the payment of a debt due; and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel for which an action is maintainable. In such an action, even upon the general issue, evidence may be received to show that the writer bona fide believed the facts stated in the petition to be true. *Fairman v. Lee*, E. 3 G. 4, 642

LIEN.

1. The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale; the factor also being similarly indebted to I. S., sold the goods to him. The factor afterwards became bankrupt; and on a settlement of accounts between I. S. and the assignees, I. S. allowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees, afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner. *Hudson v. Granger*, M. 2 G. 4, 27
2. A., a foreign merchant, purchased in his own name, but on account and with the money of B., a British merchant, certain bank shares in the French funds. The latter drew bills upon A., which he accepted, on the security of those shares standing in his name; and these bills were assigned by B., for a valuable consideration, to C., a British subject. Before they became due, B. authorized A. by letter to sell the bank shares, in order to reimburse himself against the bills. Before that letter arrived, A. had stopped payment, and afterwards became bankrupt, and the bills were dishonoured; B. also afterwards became bankrupt. C., by process in the foreign country, attached the bank shares still standing in the name of A., for the debts due to him upon the bills; and the court there decreed that the bank shares should be sold, and that the proceeds should be applied, first, to pay a debt due from B. to A., and afterwards to retire the bills. Under this decree C. received a certain sum of money on account of the bills: Held, that the assignees of A. could not recover back this money as belonging to B. *Cazenove and Another, Assignees of Power, v. Prevost and Others*, M. 2 G. 4, 70
3. A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners. Goods having been sent by the carrier, addressed to the order of I. S., a mere factor: Held, that the carrier had not, as against the real owner, any lien for the balance due from I. S. Query, whether, if the notice had been, that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from I. S. *Wright v. Snell and Others*, H. 2 and 3 G. 4, 350

LIMITATIONS, STATUTE OF.

1. In an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due,

there being no cause of action until there is a party capable of suing. *Murray, Administrator, v. The East India Company*, M. 2 G. 4, 204

2. Where on a plea of *actio non accrevit infra sex annos*, it appeared that a writ of *testatum capias* was issued, within six years in Michaelmas term, and an *alias testatum capias* in Easter term following, but no writ in Hilary term: Held, that this was sufficient to take the case out of the statute, the suit being actually, although irregularly, commenced within six years, and that the continuances in Hilary term might be supplied at any time. *Beardmore v. Rattenbury*, H. 2 and 3 G. 4, 452
3. In order to save the statute of limitations, it is sufficient that the writ be sued out, and the return thereon endorsed upon it in time. It is not necessary that the writ should be delivered out of the sheriff's office as returned. *Taylor and Another, Assignees, v. Hipkins*, H. 2 and 3 G. 4, 489
4. Where premises were mortgaged in fee, with a proviso for re-conveyance, if the principal and interest were paid on a given day, and in the mean time that the mortgagor should continue in possession; upon special verdict it was found that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury, either that interest had or had not been paid by the mortgagor: Held, that upon this finding, it must be taken, that the occupation was by the permission of the mortgagee, and consequently, that although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations: Held, also, that an entry is not necessary to avoid a fine levied by the mortgagor. *Hall v. Doe dem. Surtees (in error)*, E. 3 G. 3, 687

LORDS' ACT.

See PARTNERSHIP, 2.

1. When a defendant is in execution for a particular debt, under 300*l.*, although the aggregate of the debts for which he is in execution exceeds that sum, he is liable, at the instance of the particular creditor, to be brought up under the compulsory clause in the Lords' act, 33 G. 3, c. 5. *Chappell v. Ashley*, H. 2 and 3 G. 4, 537
2. The notices required by 32 G. 2, c. 28, s. 16, need not be personally served on the detaining creditors. Where the service was sworn to be on the attorney of a creditor residing abroad, it was held sufficient, although the affidavit did not state that he was the attorney last employed in the suit under which the insolvent was detained, the objection being taken by the insolvent, and not on the part of the creditor. *Chappell v. Ashley*, E. 3 G. 4, 749
3. A married woman who, with her husband, is in execution for a debt contracted by her before coverture, is not entitled to be discharged under the insolvent act; she not being capable of executing a warrant of attorney,

and complying with the other terms required by the 1 G. 4, c. 119, s. 25. *Ex parte Deacon*, E. 3 G. 4, 759

MANDAMUS.

See PRACTICE, 21, 44.

MARRIED WOMAN.

See PRACTICE, 23, 26. LORDS' ACT, 3.

MARRIAGE SETTLEMENT.

See DEVISE, 4. FINE, 1.

MEMORIAL.

See ANNUITY, 2, 3.

MILITIA MAN.

See SETTLEMENT, 1.

MINES.

See POOR RATE, 1.

MONEY HAD AND RECEIVED.

See PLEADING, 11.

MORTGAGOR AND MORTGAGEE.

1. A mortgagor in possession of the premises mortgaged, is tenant to the mortgagee. *Partridge v. Bere*, E. 3 G. 4, 604
2. Where premises were mortgaged in fee, with a proviso for re-conveyance, if the principal and interest were paid on a given day, and in the meantime that the mortgagor should continue in possession; upon special verdict, it was found that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury either that interest had or had not been paid by the mortgagor: Held, that upon this finding, it must be taken, that the occupation was by the permission of the mortgagee, and consequently that although more than twenty years had elapsed since default in payment of the money, still the mortgagee was not barred by the statute of limitations: Held also, that an entry is not necessary to avoid a fine levied by the mortgagor. *Hall v. Doe dem. Surtees and Another*, in error, E. 3 G. 4, 687

NEW TRIAL.

See PRACTICE, 28.

NON-USER.

See COURT, 1.

NOTICE OF ACTION.

By a local act relating to the commissioners of sewers for Westminster, it was provided that no plaintiff should recover in any action brought for any thing done in pursuance of the general acts for sewers, or that act, unless notice in writing was given to the defend-

ants, specifying the cause of such action. A notice stated that the defendants, who were contractors under the commissioners, made, altered, &c., certain sewers, &c., running under, through, or adjoining, or near to the plaintiff's house, in so negligent incautious, unskillful, improvident, and improper a manner, that it fell down; and by the declaration and proof given, it appeared that the sewer did not run close to the plaintiff's house, but close to five other houses adjoining thereto, and that the house was damaged, and fell in consequence of the fall of a stack of chimneys of one of those houses, which had been built on the arch of the sewer, and which had been insufficiently shored up by the defendants during the continuance of the work: Held, that this notice sufficiently described the cause of action: Held, also, that commissioners of sewers, and persons working by their order, in the course of the necessary repair of a sewer in the neighbourhood of houses, are bound to take all such proper precautions for securing them, and to shore them up if necessary, as skilful persons would do, and that they were bound, under the above circumstances, to give specific notice to the owner of the house to which the stack of chimneys belonged, of their construction, and of the danger arising therefrom, and that a general notice to him to take proper means to secure his house was not sufficient. *Jones v. Bird*, T. 3 G. 4, 837

OUTLAWRY.

See PLEADING, 25.

PACKETS.

See HARBOUR DUES, 1.

PARTNERSHIP.

1. Where an infant held himself out as in partnership with I. S., and continued to act as such till within a short period of his coming of age; but there was no proof of his doing any act as a partner after twenty-one: Held, that it was his duty to notify his disaffirmance of the partnership on arriving at twenty-one; and as he had neglected to do so, that he was responsible to persons who had trusted I. S. with goods, subsequently to the infant's attaining twenty-one, on the credit of the partnership. *Goode v. Harrison*, M. 2 G. 4, 147
2. By a deed of dissolution of partnership a power was reserved to the remaining partners to use the name of the retiring partner in the prosecution of all suits. In an action in which judgment had been obtained by all the partners before the dissolution, it was held that the remaining partners had authority, under that power, to give to the defendant a note for the payment of the six-pences under the Lords' act on behalf of themselves and the retiring partner. *Burton and Others v. Iscutt*, M. 2 G. 4, 287
3. By deed, A. and B. covenanted to become partners in the business of army clothiers, for ten years, and that A. should advance 20,000*l.* as part of the capital for carrying on the business, and that B. should find a like

sum; that A., during the continuance of the partnership, should have out of the profits, if sufficient, or, if not, out of the capital, 20,000*l.* yearly for his share of the profits. B. then covenanted that, on the determination of the partnership by effusion of time, the sum of 20,000*l.* should be repaid to A.; that B. should guarantee all debts and pay all losses. In an action brought upon this deed to recover the 20,000*l.* at the expiration of the ten years, the defendant pleaded that the deed was executed by way of shift, in pursuance of an usurious agreement. That plea, upon issue joined, was negatived by the verdict of the jury, and judgment was given by the Court of C. P. for the plaintiffs: Held, upon error in K. B., that after that finding the deed must be taken to disclose the real intention of the parties, and that it was not, therefore, void upon the ground of usury. *Gilpin v. Enderby*, T. 3 G. 4, 954

PAWNBROKER.

1. A pawnbroker is a broker within the 5 G. 2, c. 30, s. 39, and therefore subject to the bankrupt laws.

A person who had formerly taken in goods upon pledge, but had ceased to do so, still continuing to sell the unredeemed pledges, thereby carries on the trade of a pawnbroker, and is subject to the bankrupt laws. *Rawlinson v. Pearson*, M. 2 G. 4, 124

2. A pawnbroker has no right to sell unredeemed pledges after the expiration of a year from the time the goods were pledged, if the original owner tender him the principal and interest due. *Walter v. Smith*, H. 2 and 3 G. 4, 439

PENAL ACTION.

1. In order to constitute the offence of keeping a setting dog within the 5 and 6 Anne, c. 14, s. 4, the dog must be kept for the purpose of killing and destroying game; and, therefore, where it appeared that at the time when the alleged offence was charged to have been committed, the dog was tied up, and never went out into the field with its master, this was held not to be an offence within the statute. *Hayward v. Horner*, H. 2 and 3 G. 4, 817
2. J. B. being the master of the workhouse, appointed by and receiving orders from the guardians of the poor of the parish of W., bought provisions from A. B., one of such guardians: Held, that A. B. was liable to the penalty of 100*l.* imposed by the 55 G. 3, c. 137, s. 6. *West v. Andrews*, H. 2 and 3 G. 4, 328

PERIL OF THE SEA.

See INSURANCE, 2, 3.

PERJURY.

See CRIMINAL INFORMATION, 3.

PERPETUITY.

See DEVISE, 8.

PEW.

See ACTION ON THE CASE, 1.

PILOT.

See SHIP OWNER, 1.

PLEADING.

1. A., B., and C. entered into a bond to the king, the condition of which was, that A., as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum; and also the price of such vellum, together with all moneys which he should receive on account of the duties on personal legacies and stage-coaches. A., as subdistributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. A. sci. fa. having afterwards issued upon the bond, B., one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same: Held, in an action brought by the surety to recover these sums from the bankrupt, that A. was a person "surety for, or liable for, a debt" of the bankrupt, within the meaning of the 49 G. 3, c. 121, s. 8; and consequently that the latter was protected by his certificate: Held, also, that the general plea of bankruptcy was well pleaded. *Westcott v. Hodges*, M. 2 G. 4, 12
2. Declaration stated, that in consideration that plaintiff would assign to defendant a bill of exchange, defendant undertook, &c.; and then averred that plaintiff did assign the bill. It appeared that the parties had agreed that the plaintiff should give up the bill to the defendant; the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff by deed assigned to the defendant, the bill and all sums of money due thereon, to and for the defendant's own use; and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill: Held, that the declaration imported, that the plaintiff had made an absolute assignment of the bill, and consequently, that the assignment in evidence being only conditional, this was a fatal variance. *Vancandau v. Burt*, M. 2 G. 4, 42
3. Assumpsit in consideration that the plaintiff, for the accommodation and at the request of the defendant, would accept certain bills of exchange, and would deliver them so accepted to the defendant, in order that he might negotiate the same for his own benefit, defendant undertook to provide money for the payment of the said bills as they became due, and to indemnify the plaintiff from any loss or damage, by reason of the acceptance thereof. Breach, that the defendant did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof the plaintiff, as acceptor, was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses: Held, upon demurrer, that as plaintiff might be entitled, upon this declara-

- tion, to recover special damage, a set-off was not a good plea. *Hardcastle v. Netherwood*, M. 2 G. 4, 93
4. Declaration upon four bills of exchange. Plea in bar, that defendant was indebted to plaintiff in divers large sums of money for goods sold, and that, for securing to the plaintiff the said several sums of money, defendant, before his bankruptcy, accepted a bill of exchange drawn by the plaintiff, for and in payment of one of the said several sums of money in which he was so indebted as aforesaid; and that he had accepted each of the several bills of exchange for which the action was brought, in payment of one other of the said several sums of money, in which he so stood indebted as aforesaid. The plea then stated that defendant had duly become bankrupt; and that the bills of exchange mentioned in the declaration were provable under the commission; and that the plaintiffs, being creditors for the amount of the money comprised in all the several bills, proved the amount of one bill only under the commission, and thereby made their election to take the benefit of the commission, not only with respect to the debt so proved, but also as to the bills and debts mentioned in the declaration: Held, upon demurrer, that this plea could not be supported; first, because the proof of a debt under the commission of bankruptcy cannot be pleaded in bar to an action at law brought for the same debt; secondly, that the election of the creditor to take the benefit of the commission, is confined by the 49 G. 3, c. 121, s. 14, to the debt actually proved, and does not extend to distinct debts ejusdem generis due at the same time. *Harley and Another v. Greenwood*, M. 2 G. 4, 95
5. The giving up a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and therefore, where a ship having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings, the agents of the owners of the vessel detained, agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damage: Held, that there being contradictory decisions as to the point whether shipowners were liable for an injury done while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages. *Longridge and Others v. Dorville and Another*, M. 2 G. 4, 117
6. Where, in an action on a policy of insurance on ship, in the usual form, for twelve months, at sea and in port, the loss averred was as follows: that the ship having arrived at the harbour of St. J., and discharged her cargo, it became necessary to place her, and she was accordingly placed, in a graving-dock, there to be repaired, and near to a certain wharf, in the graving-dock: and that, whilst she was there, by the violence of the wind and weather, she was thrown over on her side, whereby she struck the ground with great violence, and was bilged, &c.: Held, that this was a loss within the general words of the policy, "all other perils, losses, and misfortunes, &c., for which the underwriters were liable." Held, also, that the above facts, with the additional circumstance of there being two or three feet water in the graving-dock when the accident happened, did not amount to a loss by perils of the sea. *Phillips and Another v. Barber*, M. 2 G. 4, 161
7. The condition of the bond, after reciting that defendant and J. S. had delivered and endorsed to the plaintiff a bill of exchange drawn by J. S., and accepted by A. B., was, that defendant and J. S., or either of them, their heirs, &c., should pay or cause to be paid to the plaintiff, his executors, &c., the sum secured by the bill, within one month after it should become due and payable, in case it should not be then paid by the acceptor to the plaintiff, his executors, &c., according to the tenor of the said bill, together with interest from the time the bill becomes due: Held, that, to an action on this bond, it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and J. S., or either of them. *Murray v. King*, M. 2 G. 4, 165
8. It is not any defence at law, to an action on a bond against a surety, that by a parol agreement time has been given to the principal. *Davie and Others v. Prendergrass*, M. 2 G. 4, 187
9. Assumpsit will lie upon a bill of exchange against a trading corporation whose power of drawing and accepting bills is recognised by statute.
- In an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, it was held, that the statute of limitations begins to run from the time of granting the letters of administration, and not from the time the bills become due, there being no cause of action until there is a party capable of suing.
- An agent having money in his hands belonging to his principal, purchases with it a bill of exchange, which he endorses specially to his principal; the latter, at the time of the endorsement, was dead, but that fact was not known to the agent: Held, that the property in the bill passed to the administrator of the principal, and that he might therefore sue upon the bill in that character: Held, also, that the administrator was only entitled to recover interest upon bills accepted after the death of the testator, from the time of demand of payment made by the administrator, and not from the time the bills became due.
- Where the declaration stated the drawing of certain bills of exchange, and their acceptance after the death of the intestate, the granting of the letters of administration to the plaintiff, the defendant's liability, &c.;

- and the defendant pleaded that the cause of action did not accrue within six years, to which the plaintiff replied generally, that it did accrue within six years: It was held, that the replication was good. *Murray v. The East India Company*, M. 2 G. 4, 204
10. In trespass, the first count of the declaration stated, that the defendant assaulted and imprisoned plaintiff; and, during such imprisonment, struck, pulled, and pushed him about; justification, that defendant arrested plaintiff under process of court; and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c.: Held, that this latter part of the justification not being proved, the plaintiff was entitled to judgment; and that it was not necessary to new assign the battery by the defendant: Held, also, that the second count of the declaration (which omitted the battery) having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses as laid in the first count. *Phillips v. Hougate*, M. 2 G. 4, 220
11. Where the plaintiffs were creditors and defendants debtors to T. and Co., and by consent of all parties, an arrangement was made that defendant should pay to plaintiffs the debt due from them to T. and Co.: Held, that as the demand of T. and Co. on defendants was for money had and received, the plaintiffs were entitled to recover, on a count for money had and received, against the defendants. *Wilson v. Coupland*, M. 2 G. 4, 228
12. The condition of a bond, after reciting that A., B., and C. had filed a bill in equity against D. and E., was, that the obligee should pay all such costs as the Court of Chancery should award to the defendants on the hearing of the cause: Held, by three justices (Abbott, C. J., dubitante), that the death of E. before any costs awarded could not be pleaded in discharge of the bond. *Kipling v. Turner*, M. 2 G. 4, 261
13. In order to constitute the offence of keeping a setting dog within the 5 and 6 Anne, c. 14, s. 4, the dog must be kept for the purpose of killing and destroying game; and, therefore, where it appeared that at the time when the alleged offence was charged to have been committed, the dog was tied up, and never went out into the field with its master; this was held not to be an offence within the statute. *Hayward v. Horner*, H. 2 and 3 G. 4, 317
14. J. S. being the master of the workhouse, appointed by and receiving orders from the guardians of the poor of the parish of W., bought provisions from A. B., one of such guardians: Held, that A. B. was liable to the penalty of 100l. imposed by the 55 G. 3, c. 137, s. 6. *West v. Andrews*, H. 2 G. 4, 328
15. A printer cannot recover for labour or materials used in printing any work, unless he affixes his name to it, pursuant to the 39 G. 3, c. 79, s. 27. *Bensley v. Bignold*, H. 2 and 3 G. 4, 335
16. An action at common law will not lie for disturbing another in the possession of a pew, unless the pew be annexed to a house in the parish. *Mainwaring v. Giles*, H. 2 and 3 G. 4, 356
17. Where judgment of nonsuit had been given in an action brought against an infant, it is no ground of error that the infant had appeared by attorney. *Bird v. Pegg*, H. 2 and 3 G. 4, 418
18. Declaration stated that defendant covenanted to obey, abide by, and perform an award, and that he would not prevent the arbitrators from making their award. It then stated that the arbitrators made their award, and thereby directed the defendant to pay a certain sum therein mentioned; and alleged as a breach of the covenant, that the defendant did not pay the sum awarded. Plea, that before the award, defendant, by deed, revoked the authority of the arbitrators, of which revocation they had notice: Held, upon demurrer, that defendant was entitled to judgment, although it appeared by the plea that he had been guilty of a breach of the covenant to abide by the award, by revoking the authority of the arbitrators, the plaintiff being entitled to recover damages only in respect of the cause of action stated in his declaration, and not in respect of a cause of action disclosed in the plea.
- The second count of the declaration stated the deed of reference, and then averred that defendant did, before the making of the award, hinder and prevent the arbitrators from making their award in this; that the defendant, by a certain deed in writing, signed and sealed by him, after reciting, as was therein recited, did revoke the authority: Held, upon demurrer, that this was an allegation, not of the mere legal effect of the deed, but of the fact of revocation; and that it was unnecessary to state that the arbitrators had notice of the revocation, that being necessarily implied in the averment, that the defendant had revoked the authority. *Marsh v. Bulteel*, H. 2 and 3 G. 4, 507
19. The contractors for making a navigable canal, having with the permission of the owner of the soil, erected a dam of earth and wood upon his close, across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrongdoer. *Dyson and Another v. Collick*, E. 3 G. 4, 600
20. Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of the third person, speaking of the plaintiff's conduct, and the declaration, in setting it out, had omitted those references: Held, that these omissions altered the sense of the remainder, and that the variance was fatal. *Cartwright v. Wright*, E. 3 G. 4, 615
21. To an action on bill of exchange the defendant pleaded non assumpsit to all but a part, and as to that part a tender. Replication, that after the cause of action accrued, and before the tender, the plaintiff demanded the sum tendered: Held, that this issue would only be supported by proof of the demand of the precise sum tendered. *Rivers v. Griffiths*, E. 3 G. 4, 630

22. An action lies for the malicious prosecution of a bad indictment for perjury: Held, also, that a count stating that defendant had maliciously indicted plaintiff for wilful and corrupt perjury, is good after verdict, although the count did not set out any indictment. *Pippett v. Hearn*, E. 3 G. 4, 634
23. A petition, addressed by a creditor to an officer in the army to the secretary at war, bona fide and with a view of obtaining, through his interference, the payment of a debt due; and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel for which an action is maintainable. In such an action, even upon the general issue, evidence may be received to show that the writer bona fide believed the facts stated in the petition to be true. *Fairman v. Lee*, E. 3 G. 4, 642
24. A count stating that defendant had and received to the use of the plaintiff a certain sum of money, to be paid by the defendant to the plaintiff upon request; and the non-payment upon request, and that the defendant converted and disposed thereof to his own use, is bad upon demurrer. *Orton v. Butler*, E. 3 G. 4, 652
25. In an original writ the defendant was described as T. B., of C., in the county of N., upon a writ of error, brought to reverse the outlawry; the error assigned was, that T. B. was not, before or at the time of the original writ, of or conversant in C. aforesaid, and that there was not any town, hamlet, or place of the name of C. in that county. Plea to this assignment of errors, that plaintiff prosecuted his writ with intent to declare upon a bond made by the defendant, by which he was described as T. B. of C. in the county of N.: Held, that this was an estoppel. *Bonner v. Wilkinson*, E. 3 G. 4, 682
26. A. covenanted that he would, from time to time, at the request of B., avow and confirm all actions that B. should bring in respect of a bond, of which A. was the obligee, without releasing the same. Declaration stated that B. commenced an action in the name of A., against the obligor of the bond, and that A. did not, although often requested so to do, avow and justify the said action, but, on the contrary thereof, executed a release to the obligor of all actions, bonds, &c., by reason whereof the plaintiff was hindered from recovering the principal and interest, his costs, and other expenses: Upon special demurrer to this breach, it was held, first, that the averment of request was unnecessary, and that it therefore required no venue, inasmuch as it appeared that the defendant had, by executing the release, disabled himself from bringing any action upon the bond. Secondly, that it was no ground of demurrer to the whole breach, that the plaintiff was not entitled to recover the special damage. *Amory v. Broderick*, E. 3 G. 4, 712
27. Debt on a bond given to plaintiff, as treasurer of a friendly society: Plea, that the rules of the society had not been confirmed at the quarter sessions, pursuant to 31 L. 3, c. 54: Held, upon demurrer, that the plea was bad, the bond being a good bond at common law. *Jones v. Woodham*, E. 3 G. 4, 769
28. A plaintiff paid into his own bankers a check of 250*l.* drawn upon them by a third person, which they received without any objection; and in the course of the same day the drawer of the check paid in a sum of money, part of which he particularly appropriated, leaving a balance unappropriated of 237*l.* The bankers, who were then creditors of the drawers to a large amount, wrote on the next morning to the plaintiff stating, that the check was not paid, but that they would keep it in the hope of there being money to pay it; and on that day a further unappropriated balance was paid in, making altogether a sum exceeding the plaintiff's check: Held, that under these circumstances, the plaintiff might maintain money had and received against the bankers, and that the latter, being his agents for receipt of the money, could not appropriate the balance to the payment either of their own general account against the drawer, or of two checks presented on the same day, but subsequently to that of the plaintiff, and paid by them. *Kileby v. Williams, and Others*, T. 3 G. 4, 815
29. Declaration for tithes bargained and sold. Plea, that before the exhibiting of the plaintiff's bill, the defendant paid to the plaintiff a sum of money, parcel, &c., in discharge and satisfaction of the promises in the declaration mentioned, and that plaintiff accepted the same in satisfaction and discharge of the promises. Replication, that before the exhibiting of the bill, the plaintiff had sued out a latitat, and that the defendant did not, before the plaintiff sued out that writ pay the plaintiff the said sum of money in manner and form as the defendant had alleged. Upon demurrer, it was held that the plea was bad, because it did not allege the payment to have been in discharge of the costs and damages accrued by reason of the non-performance of the promises. *Francis v. Crywell*, T. 3 G. 4, 886

PLEDGE.

- A. and B. having agreed to purchase cottons on their joint account directed their brokers to purchase the same. These purchases having been made, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession as the brokers of A. Immediately after the purchase B. paid A. one half of the value. After considerable purchases had been made, the brokers were informed that B. had an interest in the goods purchased; A. after this, directed the brokers to procure him a loan on the security of the warrants, and C. advanced money by discounting bills drawn by A. upon the brokers, as a security for which, the whole of the warrants were deposited with C. by the brokers. While they were so deposited, the brokers received directions both from A. and B. to make a division of the goods held on their joint account, which they did by appropriating specific warrants to each party, and which

division was approved of by both. Before the bills became due, the brokers were directed by A. to get one half renewed, which C. agreed to do, and discounted fresh bills, and the brokers then left in the hands of C., as a security for the money thus advanced, the warrants belonging to B.; C., however, not then knowing that B. had any interest in them:

Held, first, that the first pledge did not transfer to C. any interest in that part of the goods which belonged to B. *Sembla*, that a sale by one of two tenants in common of the whole property, is a conversion as to the share of one, and consequently that trover is maintainable:

Held, secondly, that after the partition had taken place, the tenancy in common, if it ever had existed, was determined, and that being so, the second pledge was a pledge of a specific chattel belonging to B. which the brokers had no authority to make, and that trover was maintainable. *Barton v. Williams*, H. 2 and 3 G. 4, 395

POOR.

L. S. being the master of the workhouse, appointed by and receiving orders from the guardians of the poor of the parish of W., bought provisions from A. B., one of such guardians: Held, that A. B. was liable to the penalty of 100*l.* imposed by the 55 G. 3, c. 137, s. 6. *West v. Andrews*, H. 2 and 3 G. 4, 328

POOR RATE.

Where the owner of the soil, by indenture, granted to certain adventurers full and free liberty to dig, mine, and search for tin, tin ore, &c., and the same to take and convert to their own use, subject to a reservation therein contained, and to make such adits, shafts, &c., as they should think necessary, yielding and paying to him one full eighth share of all such tin, tin ore, &c., the same having been first spalled, picked, or otherwise made merchantable, and fit to be smelted, and the indenture contained a power either for payment in ore, or the amount thereof in money, which had been acted upon; and the owner had received it in money: Held, that for this, his one-eighth share, he was liable to be rated as an occupier of land, the reservation operating as an exception out of the demise, and not being of the nature of a rent. *Rex v. The Inhabitants of St. Austell*, E. 3 G. 4, 693

POWER OF APPOINTMENT.

Certain lands were conveyed to A. B., his heirs and assigns, to such uses as C. D. should by deed appoint; and in default of, and until appointment, to the use of C. D. in fee. C. D. afterwards, in execution of the power by deed duly made an appointment of the said estates in favour of E. F. in fee. C. D., at the time of making the appointment, was married. His wife was held not to be dowerable out of these lands. *Ray v. Pung*, E. 3 G. 4, 561

POWER OF ATTORNEY.

See PRINCIPAL AND AGENT, 2.

Where a power of attorney was given to fifteen persons, jointly or severally therein named to execute such policies as they or any of them should jointly or severally think proper: Held, that an execution of such power by four of the persons named was sufficient. *Guthrie v. Armstrong*, E. 3 G. 4, 628

POWER OF LEASING.

See LEASE, 2.

PRACTICE.

See NOTICE OF ACTION.

1. A submission to arbitration under 9 and 10 W. 3. c. 15, s. 1, may be made a rule of court in vacation. *In the Matter of Taylor*, M. 2 G. 4, 217
2. Where a plaintiff in error resides out of the jurisdiction of the court, he may be compelled to give security for costs: and in default thereof, the defendant in error will be permitted to proceed on his judgment notwithstanding the writ of error. *Lewis and Others v. Owens*, M. 2 G. 4, 265
3. A tipstaff is entitled to take a fee of 6*s.* and no more, for conducting a prisoner from the Judge's Chambers to the King's Bench. *In the Matter of Salisbury*, M. 2 G. 4, 266
4. Where on a plea of *actio non accrevit infra sex annos*, it appeared that a writ of *testatum special capias* was issued, within six years in Michaelmas term, and an alias *testatum capias* in Easter term following, but no writ in Hilary term: Held, that this was sufficient to take the case out of the statute, the suit being actually, although irregularly, commenced within six years, and that the continuance in Hilary term might be supplied at any time. *Beardmore v. Kattenburg*, H. 2 and 3 G. 4, 452
5. In order to save the statute of limitations, it is sufficient that the writ be sued out, and the return thereon endorsed upon it in time. It is not necessary that the writ should be delivered out of the sheriff's office as returned. *Taylor and Another, Assignees, v. Hipkins*, H. 2 and 3 G. 4, 489
6. Where, in the account between plaintiff and defendant, there are items clearly due on both sides, it is an arrest without reasonable and probable cause within 43 G. 3, c. 46, s. 3, if the plaintiff arrests and holds the defendant to bail for the amount due to him, without at the same time giving him credit for the items clearly due on the other side of the account. He ought only to hold the defendant to bail for the admitted balance. *Dronfield v. Archer*, H. 2 and 3 G. 4, 513
7. Where a rule has been obtained for staying the proceedings in ejectment, till the costs of a former ejectment have been paid, the Court will not interfere, and permit the defendant, in case those costs are not paid before a certain day to be named by the Court, to non pros. the ejectment pending. *Doe dem. Sutton v. Ridgway*, H. 2 and 3 G. 4, 523
8. Where, in a case in which a corporation were

- defendants, the record is withdrawn in consequence of the absence of a material witness who is one of the corporation, and it does not appear that such absence arises from the act of, or is in collusion with the other corporators, the prosecutor will be compelled to pay the costs of not proceeding to trial pursuant to notice. *Re v. The Mayor, &c., of Great Yarmouth*, H. 2 and 3 G. 4, 531
9. Where an attorney, knowing that bail are insufficient, puts them in, and gives notice of justification, he will be personally liable to pay the costs of the opposition. *Blundell v. Blundell*, H. 2 and 3 G. 4, 533
10. A certificate to deprive a plaintiff of costs, may be endorsed on the postea after costs have been taxed, and although the defendant's attorney was present, and did not object to such taxation. *Foxall v. Banks*, H. 2 and 3 G. 4, 536
11. When a defendant is in execution for a particular debt, under 300*l.*, although the aggregate of the debts for which he is in execution exceeds that sum, he is liable, at the instance of the particular creditor, to be brought up under the compulsory clause in the Lords' act, 33 G. 3, c. 5. *Chappell v. Ashley*, H. 2 and 3 G. 4, 537
12. A clerk to an attorney held, during the term for which he was bound, the office of surveyor of taxes under the crown: Held, that he could not, within 22 G. 2, c. 46, s. 8 and 10, be considered as serving his whole time and term in the proper business of an attorney; and that he ought not to be admitted on the roll; and that having been admitted, he ought to be struck off. *Ex parte Taylor, Gent. one, &c.*, H. 2 and 3 G. 4, 538
13. In trespass the Court will, upon a proper case being made for it, require the plaintiff's attorney to give to the defendants information as to the place of abode and occupation of the plaintiff. And where the alleged assault was stated to have taken place, at a meeting at which many thousand people were present, and the defendants did not know, and could not find out, after diligent inquiry, who the plaintiff was, the Court thought it a proper case for their requiring such information to be given. *Johnson v. Birley*, H. 2 and 3 G. 4, 540
14. Where the facts tending to criminate a magistrate took place twelve months before the application to the Court, they refused to grant a criminal information, although the prosecutor, in order to excuse the delay, stated that the facts had not come to his knowledge till very shortly previous to the application. *Re v. Bishop*, E. 3 G. 4, 612
15. An attorney brought his action for his bill of costs, and held the defendant to bail for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for so doing: Held, that this was a case within the 43 G. 3, c. 46, s. 3; and that if not within the statute, still the Court, in the exercise of its jurisdiction over its officers, would compel an attorney to pay costs under such circumstances. *Robinson v. Elam*, E. 3 G. 4, 661
16. A motion for security for costs, on the ground of the plaintiff's residence abroad, cannot be made if the defendant has taken any step in the cause subsequently to his becoming acquainted with the fact of the plaintiff's being resident abroad, and therefore, the affidavit in support of the motion, if made after plea, must expressly state that defendant was not acquainted with it when he pleaded. *Duncan v. Stint*, E. 3 G. 4, 702
17. On motion for setting aside proceedings on the bail bond, bail above having justified the affidavit, must state that the defendant has a good defence upon the merits. *Grottick v. Bailey*, E. 3 G. 4, 703
18. Where bail are rejected on account of the insufficiency of one, the bail piece becomes a nullity, and therefore, the notice should be for putting in and justifying bail, and not of adding bail. *Lewis v. Gadderer*, E. 3 G. 4, 704
19. Defendant being taken up on the 8th of June upon an indictment for a libel, entered into a recognisance to appear and plead within the first eight days of Trinity Term, and to try the cause at the sittings after that term. The defendant pleaded not guilty, but did not give notice of trial, or make up the record either for the sittings after Trinity or Michaelmas term, nor were the recognisances respite. The prosecutors gave notice of trial after Trinity and Michaelmas term, but the causes were not tried. The defendant was ready and willing to take his trial on both these occasions. The recognisances were estreated in Hilary term without any notice to the defendant, or any motion by the prosecutor: Held, that this estreat was regular. *Re v. Clarke*, E. 3 G. 4, 728
20. The Court will grant a habeas corpus to the warden of the Fleet, to take the body of a debtor confined there, before a magistrate to be examined from time to time respecting a charge of felony or misdemeanor. *Ex parte Griffith v. Griffiths*, E. 3 G. 4, 730
21. Where a return to a mandamus to restore a party to a corporate office is defective in form, but, on the whole, it appears that there is good ground for a motion, the Court will not award a peremptory mandamus; the only effect of which would be to compel the corporation to restore an officer whom they would be bound immediately to remove in a more formal manner. *Re v. Edmund Griffiths*, E. 3 G. 4, 731
22. Attachment irregular, being obtained after summons to attend before a judge for payment of debt and costs, the plaintiff's attorney not having attended at the time. *Re v. The Sheriff of Middlesex in Woodward v. Feltham*, E. 3 G. 4, 746
23. On an application to discharge a defendant out of custody, on the ground that she was a married woman, it is necessary that that fact should be positively stated in the affidavit. And, therefore, where it was sworn that she was a married woman, as by certificate annexed will appear, it was held insufficient. *Harvey v. Cooke*, E. 3 G. 4, 747
24. Where a plea is so framed as that it may reasonably induce the plaintiff to consult counsel in order to know how to deal with it,

- the Court will, on affidavit that such a plea is wholly false, permit the plaintiff to sign judgment as for want of a plea. *Shadwell v. Berthoud*, E. 3 G. 4, 750
25. It is not a valid objection on showing cause, that a rule to compute was moved on the day of signing interlocutory judgment for not bringing in the record. *Russen v. Hayward*, E. 3 G. 4, 752
26. A married woman who, with her husband, is in execution for a debt contracted by her before coverture, is not entitled to be discharged under the insolvent act; she not being capable of executing a warrant of attorney, and complying with the other terms required by the 1 G. 4, c. 119, s. 25. *Ex parte Deacon*, E. 3 G. 4, 759
27. In trespass against custom-house officers for taking plaintiff's goods, which had been returned in a deteriorated state before action brought, a verdict was found for plaintiff, for the difference in price between the value of the goods at the time of the seizure, and the time when they were returned. The judge certified that there was probable cause for the seizure: Held that the plaintiff was not precluded by the 28 G. 3, c. 37, s. 24, from taking out execution for the damages found by the jury. *Laugher v. Brestitt*, E. 3 G. 4, 762
28. Where a new trial is ordered, the costs to abide the event, such event means the ultimate event of the cause, and therefore, if the verdict on the second trial be set aside, and on a third trial, the ultimate event is the same as at the first trial, the party will be entitled to the costs of the first trial. *Meule v. Goddard*, E. 3 G. 4, 766
29. A tenancy by virtue of an agreement in writing for three months certain, is a tenancy "for a term" within the meaning of the 1 G. 4, c. 87.
Upon a rule, calling upon the tenant to enter into a recognisance under that statute, it is unnecessary to express in the rule nisi the amount of the security required. *Doe dem. Phillips v. Roe*, E. 3 G. 4, 766
30. An information in the nature of a quo warranto may be granted at common law, within the 9 Anne, c. 20, against a party for exercising the office of a bailiff in the borough of M. although it was not a corporate office. Quere, whether in such a case the defendant may plead several matters. *Rez v. Highmore*, E. 3 G. 4, 771
31. The 17 G. 3, c. 56, s. 22, takes away the writ of certiorari only from offences for the first time created by 22 G. 2, c. 27, and does not apply to those created by 12 G. 1, c. 34, and extended to the silk and cotton trades by 22 G. 2, c. 27. *Rez v. Rogers*, E. 3 G. 4, 773
32. A judge's certificate under 43 Eliz. c. 6, is sufficient to deprive a plaintiff of costs, notwithstanding the action be brought under 11 G. 2, c. 19, s. 19, by which, in case the plaintiff obtains a verdict, he is entitled to full costs. *Irvine v. Reddish*, E. 3 G. 4, 796
33. The 19 G. 3, c. 70, s. 4, is confined to those suits in inferior courts where the proceedings are similar to those in the superior courts; and, therefore, does not extend to the case of a foreign attachment. *Bulmer v. Marshall*, T. 3 G. 4, 821
34. Where a bailiff had written to an attorney for writs, which the latter sent without knowing anything of the parties or circumstances, but the bailiff never represented himself, or had been considered as an attorney, nor looked for any profit upon the law proceedings: Held, that this was not a case within the 22 G. 2, c. 46, s. 11: but that it was a most improper practice, which the Court, in virtue of its general jurisdiction over attorneys, would punish severely. *Ex parte Wharton*, T. 3 G. 4, 824
35. A bond was conditioned for the resignation of a living, which the defendant, when requested, had refused to resign: Held, that he being a wrongdoer, the jury were not bound, in assessing the damages, to confine themselves to the diminution of the value of the advowson to the plaintiff by the defendant's life-interest; nor, in estimating the annual proceeds, to deduct the curate's stipend. *Lord Sondes v. Fletcher*, T. 3 G. 4, 835
36. A bill against an attorney was filed of Michaelmas term, and appeared by the memorandum to have been filed on the 28th November: Held, that evidence was admissible to show that it was actually filed on the 24th December: Held, also, that a demand and refusal is evidence of a prior conversion; and, therefore, where deeds were in defendant's possession prior to Michaelmas term, and the demand and refusal proved were on the day after that term, it was held, that this was evidence of a conversion before the term. *Wilton v. Girdlestone*, T. 3 G. 4, 847
37. The notice to the tenant in possession at the foot of the declaration in ejectment, need not be in the name of the plaintiff; but, if in the name of the lessor of the plaintiff, or even any other person, the Court will permit the rule for judgment against the casual ejector to be drawn up. *Goodtitle dem. Duke of Norfolk v. Nottile*, T. 3 G. 4, 849
38. Where a surety in a warrant of attorney, in order to discharge himself from his personal liability, paid part of the debt due to the creditor of a bankrupt, who had proved under the commission, and thereupon satisfaction was entered on the record: Held, that this did not fall within the 49 G. 3, c. 121, s. 8, as being a payment of part of a debt in discharge of the whole, and that consequently the bankrupt's certificate was no bar to an action by the surety to recover the money so paid by him. *Soutten v. Soutten*, T. 3 G. 4, 852
39. In debt for use and occupation after judgment by default. Semble that a writ of inquiry is necessary before signing final judgment. *Arden v. Connell*, T. 3 G. 4, 855
40. Where a plaintiff had issued one writ against three defendants for separate causes of action, and after delivering three separate declarations de bene esse, entered one common appearance according to the statute for all the three defendants, and signed three interlocutory judgments as for want of plea: Held, that this was irregular. *Cox v. Bucknell*, T. 3 G. 4, 892
41. Where a plaintiff had been nonsuited at

- Nisi Prius on the ground of a trifling variance between the contract set out and that proved, the Court granted a new trial with leave to amend the declaration generally on payment of costs, with liberty to defendant to plead de novo or demur. *Williams v. Pratt*, T. 3 G. 4, 896
42. Charges for holding the courts leet of a manor by the steward, are charges for business connected with his professional character of an attorney; and, therefore, are like conveyancing charges, taxable when found in a bill containing other taxable items. *Luxmore, Gent., one, &c., v. Lethbridge, one, &c.*, T. 3 G. 4, 898
43. The Court will not grant a mandamus to a private trading corporation to permit a transfer of stock to be made in their books. *Re v. The London Assurance Company*, T. 3 G. 4, 899
44. Where a lord of a manor is indicted for a nuisance in not repairing the bank of a river, the Court will not compel him to allow the prosecutor, even though he is a tenant of the manor, to inspect the court rolls for the purpose of obtaining evidence in support of the prosecution. *Re v. The Earl of Cadogan*, T. 3 G. 4, 902
45. No motion can be made to stay the proceedings in an action on a judgment pending a writ of error until bail have been put in and perfected. *Abraham v. Pugh*, T. 3 G. 4, 903
46. Where a plaintiff, shortly previous to making an affidavit of debt, had written a letter, stating that the defendant was a creditor of his, the Court interfered in a summary way to discharge the defendant out of custody, on affidavits denying the debt, the plaintiff not having denied the writing of such letter by him, or alleged that the debt due to him had arisen subsequently to it. *Nizetich v. Bonacich*, T. 3 G. 4, 904
47. Where a defendant being previously in custody in execution for a debt, a detainer was lodged against him, but for too large a sum, and on this being discovered in a few hours, the plaintiff discontinued on payment of costs, and before the payment of costs lodged a fresh detainer. Held, that this second detainer was regular, and that it was not like the case of a fresh arrest, which cannot be made till the costs have been paid. *White v. Gomperts*, T. 3 G. 4, 905
48. Where a cause stood in the paper below the last cause mentioned in the written list affixed at the outside of the court, and was tried, (being stated to be an undefended cause,) the counsel for the defendant objecting to it, and declining to appear: Held, that the trial was regular, and the Court refused a new trial, there being no affidavit of merits. *Blackhurst v. Bulmer*, T. 3 G. 4, 907
49. Where a plaintiff carried on business abroad and had no permanent residence in England, but was in England at the time of bringing the action, and it was sworn, had no intention of leaving the country: Held, that this was no sufficient answer to an application for security for costs, inasmuch as it was not distinctly sworn that he resided and intended to continue to reside here: Held, also, that it is no answer to such application, that the action is brought in pursuance of liberty reserved by the Vice-Chancellor, it not being brought by his direction. *Osire v. Johnson*, T. 3 G. 4, 908

PRINCIPAL AND AGENT.

1. The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale: the factor being also similarly indebted to I. S., sold the goods to him. The factor afterwards became bankrupt; and, on a settlement of accounts between I. S. and the assignees, I. S. allowed credit to them for the price of the goods, and proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner.
- By 47 G. 3, sess. 2, c. 28, s. 29, "All contracts for coals are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of the market." A factor having coals consigned to him for sale by A., sold the same, and entered the contract in his book as having been made for C., the master of the ship. It was not signed by the purchaser; but, in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, was inserted: the factor had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. *Quære*, whether, under the circumstances, an action might be brought in the name of C. for the price of the coals. *Hudson v. Granger*, M. 2 G. 4, 27
2. A power of attorney authorising an agent to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all moneys, debts, dues, whatsoever, and to give sufficient discharges, does not authorise him to endorse bills for his principal. An agent having money in his hands belonging to his principal, purchases with it a bill of exchange, which he endorses specially to his principal; the latter, at the time of the endorsement, was dead, but that fact was not known to the agent: Held, that the property in the bill passed to the administrator of the principal, and that he might therefore sue upon the bill in that character. *Murray v. The East India Company*, M. 2 G. 4, 204
3. A. and B. having agreed to purchase cottons on their joint account, directed their brokers to purchase the same. These purchases having been made, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession as the brokers of A. Immediately after the purchase B. paid A. one half of the value. After considerable purchases had been made, the brokers were informed that B. had an interest in the goods purchased; A., after this, directed the brokers to procure him a

loan on the security of the warrants, and C. advanced money by discounting bills drawn by A. upon the brokers, as a security for which, the whole of the warrants were deposited with C. by the brokers. While they were so deposited, the brokers received directions both from A. and B. to make a division of the goods held on their joint account, which they did by appropriating specific warrants to each party, and which division was approved of by both. Before the bills became due, the brokers were directed by A. to get one half renewed: which C. agreed to do, and discounted fresh bills, and the brokers then left in the hands of C., as a security for the money thus advanced, the warrants belonging to B.; C., however, not then knowing that B. had any interest in them: Held, first, that the first pledge did not transfer to C. any interest in that part of the goods which belonged to B. Semble, that a sale by one of two tenants in common of the whole property, is a conversion as to the share of one, and consequently that trover is maintainable: Held, secondly, that after the partition had taken place, the tenancy in common, if it ever had existed, was determined, and that being so, the second pledge was the pledge of a specific chattel belonging to B. which the brokers had no authority to make, and that trover was maintainable. *Barton v. Williams*, H. 2 G. 4, 395

4. A., a merchant in London, had been in the habit of selling goods to B., resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B. by the first ship. In pursuance of a parol order from B., goods were delivered to and accepted by the wharfinger to be forwarded in the usual manner: Held that this, not being an acceptance by the buyer, was not sufficient to take the case out of the 29 Car. 2, c. 3, s. 17. *Hanson v. Armitage*, H. 2 and 3 G. 4, 557

PRINTER.

See PLEADING, 15.

PROMOTIONS, 438.

QUO WARRANTO.

See PRACTICE, 8.

1. Where in an application for a quo warranto against a constable, the affidavits in support of the rule stated that for fifty years back, and as long as deponents could recollect, there had been a custom in the town to elect a constable in a particular mode, but did not expressly state that they believed such custom to be immemorial:—Held, that it was not sufficient. *Rex v. Lane*, H. 2 and 3 G. 4, 488
2. An information in the nature of a quo warranto may be granted at common law, within the 9 Anne, c. 20, against a party, for exercising the office of a bailiff in the borough of M., although it was not a corporate office. Quære, whether in such a case, the defendant may plead several matters. *Rex v. Highmore*, E. 3 G. 4, 771

RATE.

See INCLOSURE ACT, 2. JUSTICES, 3.

RECOGNISANCE.

See PRACTICE, 19.

REGISTER ACT.

See DEED, 1.

RENT.

See POOR RATE, 1. LANDLORD AND TENANT, 11.

RESIGNATION BOND.

See ADVOWSON.

RELEASE.

A deed, containing a general release of all debts, &c., recited that the releasee had previously agreed to pay to the releasor the sum of 40*l.*, for the possession of certain premises, and that "in consideration of the said sum of 40*l.* being now so paid, as hereinbefore is mentioned," and also in consideration of the sum of 10*s.* a-piece, well and truly paid to the said releasor and J. S., the receipt of which said several sums of money they did thereby acknowledge, release, &c. There was also a receipt for the sum of 40*l.* endorsed on the release. But it appeared on an action afterwards brought for this sum, that in fact it had never been paid: Held, that this deed of release was no estoppel, inasmuch as the general words of release were qualified by the recital, which stated only an agreement to pay, and not an actual payment of the sum of 40*l.* *Lampon v. Corke*, E. 3 G. 4, 606

REMOVAL, ORDER OF.

1. An order of removal was dated the 1st of August, 1814, and an order of suspension endorsed thereon, in consequence of the sickness of the pauper; and a copy of such order and endorsement was, in 1814, served upon the appellants, but the original order not produced at the time of serving such copy: and subsequently, in 1815, another part of the order and endorsement, executed by the same justices, but bearing date in August, 1814, was served upon the appellants. The pauper was not removed till 1819, when an appeal was duly entered: Held, that the services of the original order of removal in 1814 and 1815 were both defective, and that the appeal was made in time, notwithstanding 49 G. 3, c. 124, s. 2. *Rex v. The Inhabitants of Alnwick*, M. 2 G. 4, 184
2. Where an order of removal has been executed, and by consent of the removing parish and the magistrates making it, it is superseded, and the paupers taken back, it is in the discretion of the sessions to enter an appeal against it or not, according as they may think that justice requires it, in order to compel the respondents to pay the costs of maintenance, &c., incurred by the appellants before the order was superseded. *Rex v. The Justices of Norfolk*, H. 2 and 3 G. 4, 484

SEA.

The public have no common-law right of bathing in the sea; and, as incident thereto, of crossing the sea shore on foot, or with bathing machines for that purpose. *Blundell v. Catterall*, M. 2 G. 4, 268

SETTLEMENT.

1. A pauper being eighteen years of age, and residing with his father, was drawn as a militia-man, and served for five years as a balloted man. During his service he, several times when on furlough, and finally after his discharge from the militia, returned to his father's house: Held, that by his so remaining separated from his father's family after twenty-one, he was emancipated, although the original separation was not voluntary on his part. *Rez v. The Inhabitants of Hardwick*, M. 2 G. 4, 176
2. During the minority of a child there can be no emancipation, unless he marries, and so becomes himself the head of a family, or contract some other relation, so as wholly and permanently to exclude the parental control. *Seemle*, that the acquiring a settlement of his own does not properly constitute an emancipation. *Rez v. The Inhabitants of Wilming-ton*, H. 2 and 3 G. 4, 525
3. Where the unemancipated daughter of an Irishman, not having acquired any settlement of his own in England, became pregnant, being unmarried, and as such was actually chargeable under 35 G. 3, c. 101, s. 6: Held, that this did not make her father and the rest of his family removable by a pass to Ireland under 59 G. 3, c. 12, s. 33; but that the daughter might be removed by an order to the place of her birth in England. *Rez v. The Inhabitants of Whitehaven*, E. 3 G. 4, 720
4. Where a district, previously extra-parochial, was, by act of parliament, made a township, and it was provided that from thenceforth it should maintain its own poor, and repair its own roads, and have the like powers, privileges, and immunities, and be subject to the same regulations, as other townships within the county: Held, that this clause was prospective only, and that a bastard born within the district previously to passing the act, was not settled there. *Rez v. The Inhabitants of Oakmere*, E. 3 G. 4, 775

SETTLEMENT BY APPRENTICESHIP.

1. An indenture of apprenticeship, executed before the passing of the 44 G. 3, c. 98, must be stamped with the premium stamp within the time prescribed by the statute 8 Anne, c. 9, and where such an indenture was stamped at the time of its being produced in evidence, with the stamp required by the 55 G. 3, c. 184, but not within the time prescribed by the statute of Anne: Held, that the indenture was wholly void, and that the pauper, by serving under it, gained no settlement. *Rez v. The Inhabitants of Chipping Norton*, H. 2 and 3 G. 4, 412
2. Where a parish apprentice was assigned by

his original master to I. S., by an instrument in writing, but there was no consent of two magistrates: Held, that this was not a lawful assignment, under 32 G. 3, c. 57, s. 7. but it was sufficient to show the consent of the first master to the service to I. S., and consequently, such service was good as a service under the original indenture, and conferred a settlement. *Rez v. The Inhabitants of Barle-ton*, E. 3 G. 4, 780

SET-OFF

Assumpsit in consideration that the plaintiff, for the accommodation and at the request of the defendant, would accept certain bills of exchange, and would deliver them so accepted to the defendant, in order that he might negotiate the same for his own benefit, defendant undertook to provide money for the payment of the said bills as they became due, and to indemnify the plaintiff from any loss or damage, by reason of the acceptance thereof. Breach, that the defendant did not provide money for the bills, nor indemnify the plaintiff from damage, by reason whereof the plaintiff, as acceptor, was forced and obliged to pay to the holders of the bills certain sums of money, with interest, charges, and expenses: Held, upon demurrer, that as plaintiff might be entitled, upon this declaration, to recover special damage, a set-off was not a good plea. *Hardcastle v. Netherwood*, M. 2 G. 4, 93

SEWERS, COMMISSIONERS OF.

By a local act relating to the commissioners of sewers for Westminster, it was provided that no plaintiff should recover in any action brought for any thing done in pursuance of the general acts for sewers, or that act, unless notice in writing was given to the defendants, specifying the cause of such action. A notice stated that the defendants, who were contractors under the commissioners, made, altered, &c., certain sewers, &c., running under, through, or adjoining, or near to the plaintiff's house, in so negligent, incautious, unskilful, improvident, and improper a manner, that it fell down; and by the declaration and proof given, it appeared that the sewer did not run close to the plaintiff's house, but close to five other houses adjoining thereto, and that the house was damaged, and fell in consequence of the fall of a stack of chimneys of one of those houses, which had been built on the arch of the sewer, and which had been insufficiently shored up by the defendants during the continuance of the work: Held, that this notice sufficiently described the cause of action: Held, also, that commissioners of sewers, and persons working by their order, in the course of the necessary repair of a sewer in the neighbourhood of houses, are bound to take all such proper precautions for securing them, and to shore them up if necessary, as skilful persons would do, and that they were bound, under the above circumstances, to give specific notice to the owner of the house to which the

stack of chimneys belonged, of their construction, and of the danger arising therefrom, and that a general notice to him to take proper means to secure his house was not sufficient. *Jones v. Bird*, T. 3 G. 4, 537

SHERIFF.

1. The growing crops of a tenant having been seized under a f. fa., a writ of hab. fac. poss. was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord founded on a demise made long before the issuing of the f. fa. Held, that the sheriff was not bound to sell the growing crops under the f. fa., inasmuch as they could not in point of law be considered as belonging to the tenant, the latter being a trespasser from the day of demise laid in the declaration: Held, also, that the sheriff had no right to allow to the landlord a year's rent, under the statute of 8 Ann. c. 14, that statute contemplating an existing tenancy, which in this case must be taken to have ceased on the day of the demise in the ejectment. *Hodgson v. Gascoigne*, M. 2 G. 4, 88
2. A sheriff has no right under a f. fa. to seize fixtures, where the house in which they are situated is the freehold of the person against whom the execution issues. *Winn v. Ingilby*, E. 3 G. 4, 625

SHIP.

1. A transfer of a ship, while at sea, to a vendee resident in the port in which the ship is registered, is not valid, unless copies of the bills of sale are delivered to the custom-house officers in that port within a reasonable time after the sale. *Richardson and Others, Assignees of Wyler and Another, v. Campbell*, M. 2 G. 4, 196
2. The captain of a ship has no authority to sell the cargo, except in cases of absolute necessity; and therefore, where, in the course of a voyage from India, the ship was wrecked off the Cape of Good Hope, and some indigo, which was part of the cargo, was saved, and the same was there sold by public auction, by the authority of the captain, acting bona fide, according to the best of his judgment for the benefit of all persons concerned; but the jury found that there was no absolute necessity for the sale: Held, that the purchaser at such sale acquired no title, and the indigo having been sent to this country, the original owners were held entitled to recover its value. *Freeman v. The East India Company*, E. 3 G. 4, 617
3. A., a ship-builder, contracted with B. to build a ship for B., and complete her in April, 1819. The latter was to pay for her by four instalments; the first when the keel was laid, the second when they were at the light plank, and the third and fourth when the ship was launched. Before the 25th June, 1819, the ship was measured, with the builder's privy, to the intent that B. might get her registered in his name. On the 25th the ship-builder signed the usual certificate of her building, and on the 26th the ship was registered in B.'s name, and on that day the third instalment was paid. On the 30th June

A. committed an act of bankruptcy, upon which a commission afterwards issued. On the 2d of July, the ship not being then completed or launched, B. and a crew hired by him took possession of the ship and a rudder and cordage, the former of which was made by the ship-builder, and the latter bought by him for the express purpose of completing the ship: Held, first, that the legal effect of the ship-builder's having signed the certificate to enable B. to have the ship registered in his name, was to vest the general ownership in B. from the time the registry was completed: Held, secondly, that as the rudder and cordage were made and bought by the ship-builder specifically for the ship, they were to be considered as parts of the ship; and that the property in them also vested in B.: Held, thirdly, that although the general property in the ship was vested in B., yet, as A. had not parted with the possession, and as he would have had a lien upon the ship for the amount of the fourth instalment, if he had completed it; that the taking possession of the ship by B., without tendering the amount of the fourth instalment, or so much thereof as was due, provided any thing was due, was wrongful, and, consequently, that the assignees of A. were entitled to recover from B. the amount of the fourth instalment, provided the expense necessary for the completion of the ship did not amount to that sum, or so much thereof as would remain due after defraying such expense. *Woods and Another, Assignees of Paton, a Bankrupt, v. Russell*, T. 3 G. 4, 942

SHIP OWNER.

The giving up of a suit, instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum; and therefore, where a ship having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted by the owners of the latter to compel the owners of the former to make good the damage, and the former vessel was detained until bail was given, and pending such proceedings, the agents of the owners of the vessel detained, agreed, on the owners of the damaged vessel renouncing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damages: Held, that there being contradictory decisions as to the point whether shipowners were liable for an injury done while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel to pay the stipulated damages. *Longridge and Others v. Dorville*, M. 2 G. 4, 117

SMUGGLER.

A smuggler may be a trader within 1 Jac. 1, c. 15, s. 2, as being a person who seeks his trade of living by buying and selling, although such buying and selling be illegal. A penalty due to the crown is a debt within 21 Jac. 1, c. 19, s. 2; and, therefore, where

a trader lay in prison above two months, being unable to pay exchequer penalties for smuggling: Held, that it was an act of bankruptcy. *Cobb, Assignee of Money, v. Symonds*, H. 2 and 3 G. 4, 516

SPIRITUOUS LIQUORS.

A plaintiff in an action for a tavern bill, is not entitled to recover for any item under 20s. for spirits supplied to the guests, such sales being prohibited by 24 G. 2, c. 40, s. 16. *Burnyeat v. Hutchinson*, M. 2 G. 4, 241

STAMP.

1. An indenture of apprenticeship, executed before the passing of the 44 G. 3, c. 98, must be stamped with the premium stamp within the time prescribed by the statute 8 Anne, c. 9, and where such an indenture was stamped at the time of its being produced in evidence, with the stamp required by the 55 G. 3, c. 184, but not within the time prescribed by the statute of Anne: Held, that the indenture was wholly void, and that the pauper, by serving under it, gained no settlement. *Rex v. The Inhabitants of Chipping Norton*, H. 2 and 3 G. 4, 412
2. Three persons joined as drawer, acceptor, and first endorser, in making an accommodation bill; and it was afterwards issued for value to J. S. Previously to its being issued, its date had been altered: Held, that the acceptor having assented to the alteration when he was informed of it, it was no answer to an action on the bill against him, that the bill had been so altered without the consent of the drawer and first endorser, and that a fresh stamp was not necessary in consequence of such alteration, the bill having been altered before it was issued in point of law. *Downes v. Richardson*, E. 3 G. 4, 674

STATUTE, CONSTRUCTION OF.

See APOTHECARIES.

STOPPAGE IN TRANSITU.

See VENDOR AND VENDEE, 8.

SURETY.

See BANKRUPT, 11.

1. A., B., and C. entered into a bond to the king, the condition of which was, that A., as subdistributor of stamps, should well and truly account for all stamped vellum which he should receive, and should pay to the commissioners the duties payable for such stamped vellum; and also the price of such vellum, together with all moneys which he should receive on account of the duties on personal legacies and stage-coaches. A., as subdistributor, becomes indebted to the king in a certain sum, and afterwards becomes bankrupt, and obtains his certificate. A sci. fa. having afterwards issued upon the bond, B., one of the sureties, paid a sum of money to compromise the suit, and a certain other sum in defending the same: Held, in an

action brought by the surety to recover these sums from the bankrupt, that A. was a person "surety for, or liable for, a debt" of the bankrupt, within the meaning of the 49 G. 3, c. 121, s. 8, and consequently that the latter was protected by his certificate: Held, also, that the general plea of bankruptcy was well pleaded. *Westcott v. Hodges*, M. 2 G. 4, 12

2. It is not any defence at law, to an action on a bond against a surety, that by a parol agreement time has been given to the principal. *Davis and Others v. Prendergrass*, M. 2 G. 4, 187

SURNAME.

See FORFEITURE, 1.

TENANT IN COMMON.

See LANDLORD AND TENANT, 10.
PRINCIPAL AND AGENT, 3.

TIPSTAFF.

See PRACTICE, 3.

TITHE.

1. A., having purchased an estate free from rectorial tithe, with a right of common thereto annexed: the common was afterwards enclosed under an act of parliament, and certain land was allotted to A. in lieu of his said right of common: Held, that no tithes was payable in respect of the allotted land. *Steel v. Manno*, M. 2 G. 4, 22
2. By an enclosure act it was enacted, that the commissioners should set out, allot, and award certain portions of lands cut of the commons to be enclosed, unto the impropriate rectors and curate, in lieu of all great and vicarial tithes; and the commissioners were required to distinguish by their award the several allotments to the impropriate rectors and curate respectively, and the same allotments were thereby declared to be in full satisfaction and discharge of all tithes: Held, under this act, that the tithes were not extinguished until the commissioners made their award. *Ellis v. Arnison*, M. 2 G. 4, 47

TONNAGE DUTY.

See HARBOUR DUES, 1.

TOWNSHIP.

See CONSTABLE, 1.

TRESPASS.

See PRACTICE, 28.

The contractors for making a navigable canal, having, with the permission of the owner of the soil, erected a dam of earth and wood upon his close, across a stream there, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrongdoer. *Dyson and Another v. Collick*, E. 3 G. 4, 600

TROVER.

See PRINCIPAL AND AGENT, 3.

1. Where goods, the property of the plaintiff,

had been, by the servant of an insurance company, carried to a warehouse, of which the defendant, a servant of the company, kept the key, and the defendant, on being applied to by the plaintiff to deliver them, refused to do so without an order from the company: Held, that this was not such a refusal as amounted to a conversion of the goods by the defendant. *Alexander v. Southey*, M. 2 G. 4, 247

2 Where certain mill-machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill; and it was afterwards seized under a f. fa. by the sheriff, and sold by him: Held, that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during the continuance of the term. *Farrant v. Thompson*, T. 3 G. 4, 826

3. A bill against an attorney was filed of Michaelmas term, and appeared by the memorandum to have been filed on the 28th November: Held, that evidence was admissible to show that it was actually filed on the 24th December: Held, also, that a demand and refusal is evidence of a prior conversion; and, therefore, where deeds were in defendant's possession prior to Michaelmas term, and the demand and refusal proved were on the day after that term, it was held, that this was evidence of a conversion before the term. *Wilton v. Girdlestone*, T. 3 G. 4, 847

UNDER-SHERIFF.

See EVIDENCE, 6.

USE AND OCCUPATION.

See PRACTICE, 39.

USURY.

See PARTNERSHIP, 3.

An enclosure act empowered the commissioners to make a rate to defray the expenses of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners. Expenses were incurred in the execution of the act before any rate was made. To defray these expenses the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned, on account of the public drainage, and to place the same to their account, as commissioners. The bankers, during a period of six years, continued to advance considerable sums by paying these drafts: Held, that the commissioners were personally responsible to the bankers for the drafts so made.

The latter having from time to time made half-yearly rests in the account, and charged interest upon the balance then struck, and the commissioners having assented to that mode of keeping the accounts, it was held, that this mode of charging of interest half-yearly was not unlawful on the ground of usury. *Eaton v. Bell*, M. 2 G. 4, 34

VARIANCE.

1. Declaration stated, that in consideration that plaintiff would assign to defendant a bill of exchange, defendant undertook, &c.; and then averred that plaintiff did assign the bill. It appeared that the parties had agreed that the plaintiff should give up the bill to the defendant; the latter, however, paying over the proceeds of the bill to the plaintiff. In pursuance of the agreement, the plaintiff by deed assigned to the defendant, the bill and all sums of money due thereon, to and for the defendant's own use; and the defendant covenanted to pay to the plaintiff a sum equal to any money he should receive on account of the bill: Held, that the declaration imported, that the plaintiff had made an absolute assignment of the bill, and consequently, that the assignment in evidence being only conditional, this was a fatal variance. *Vansandau v. Burt*, M. 2 G. 4, 42
2. Where a libellous paragraph, as proved, contained two references, by which it appeared to be in fact the language of the third person, speaking of the plaintiff's conduct, and the declaration, in setting it out, had omitted those references: Held, that these omissions altered the sense of the remainder, and that the variance was fatal. *Cartwright v. Wright*, E. 3 G. 4, 615

VENDOR AND VENDEE.

1. The owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale: the factor being also similarly indebted to I. S., sold the goods to him. The factor afterwards became bankrupt; and, on a settlement of accounts between I. S. and the assignees, I. S. allowed credit to them for the price of the goods, and he then proved the residue of his claim against the estate: Held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on the account of the original owner.

By 47 G. 3, sess. 2, c. 28, s. 29, "All contracts for coals are to be fairly entered in a book to be kept by the factor, subscribed by the buyer; and a copy of such contract is to be delivered by the factor to the clerk of the market, within an hour after the close of the market." A factor having coals consigned to him for sale by A., sold the same, and entered the contract in his book as having been made for C., the master of the ship. It was not signed by the purchaser; but, in the copy delivered to the clerk of the market, the purchaser's name, as well as that of the factor, was inserted: the factor had no authority to insert the name of the master in his contract, but it was a common practice in the coal trade so to do. *Quære*, whether, under the circumstances, an action might be brought in the name of C. for the price of the coals. *Hudson v. Granger*, M. 2 G. 4, 27

2. A., a spirit merchant, sold to B. a wine merchant, several casks of brandy, some of which, at the time of the sale, were in A.'s own

- vaults, and others in the vaults of a regular warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided, that this sale had taken place; but no notice of such sale had been given to the warehouse-keeper, with whom some of the casks were deposited. A. having become bankrupt while the brandies remained where they were originally deposited, it was held, that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the 21 Jac. 1, c. 19. s. 11. *Knowles v. Horsfall and Others*, M. 2 G. 4, 134
3. A transfer of a ship, while at sea, to a vendee resident in the port in which the ship is registered, is not valid, unless copies of the bills of sale are delivered to the custom-house officers in that port within a reasonable time after the sale. *Richardson v. Campbell*, M. 2 G. 4, 196
4. Where an advertisement for the sale of a ship, described her as "a copper-fastened vessel," adding, that the vessel was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partially copper-fastened: Held, That notwithstanding the words, "with all faults, &c.," the vendor was liable for the breach of the warranty. *Shepherd v. Kain*, M. 2 G. 4, 240
5. By a public act the Waterloo Bridge Company were authorized to raise money for the purpose of completing their undertaking, either among themselves or by the admission of new members, or by granting annuities for term of years or for life. The act did not contain any provision that the annuities should or should not be redeemable. The Company however, in the original grant, reserved to themselves a power of redemption: Held, under these circumstances, that an auctioneer putting up to sale one of these annuities, was bound in his particulars of sale to describe it as a redeemable annuity. *Coverley v. Burrell*, M. 2 G. 4, 257
6. A., a merchant in London, had been in the habit of selling goods to B., resident in the country, and of delivering them to a wharfinger in London, to be forwarded to B. by the first ship. In pursuance of a parol order from B., goods were delivered to and accepted by the wharfinger to be forwarded in the usual manner: Held that this, not being an acceptance by the buyer, was not sufficient to take the case out of the 29 Car. 2, c. 3, s. 17. *Hanson v. Armistage*, H. 2 and 3 G. 4, 557
7. The captain of a ship has no authority to sell the cargo, except in cases of absolute necessity; and therefore, where, in the course of a voyage from India, the ship was wrecked off the Cape of Good Hope, and some indigo, which was part of the cargo, was saved, and the same was there sold by public auction, by the authority of the captain, acting bona fide, according to the best of his judgment, for the benefit of all persons concerned; but the jury found that there was no absolute necessity for the sale: Held, that the purchaser at such sale acquired no title, and the indigo having been sent to this country, the original owners were held entitled to recover its value. *Freeman v. The East India Company*, E. 3 G. 4, 617
8. Where goods were sold, free on board, and upon their shipment the agent of the vendors tendered to the mate (the captain being absent) a receipt by which the goods were acknowledged to be shipped on account of the vendors, which the mate kept, but refused to sign, and on the following day signed bills of lading to the orders of the vendee: Held, that the transitus was not at an end, but that on the insolvency of the vendee, the vendors were entitled to stop the goods. *Ruck v. Hatfield*, E. 3 G. 4, 632
9. The vendor of a print, being a copy in part of another, by varying in some trifling respects from the main design, is liable to an action by the proprietor of the original; and that although the vendor did not know it to be a copy. *West v. Francis*, E. 3 G. 4, 737
10. A horse was sold by verbal contract, but no time was fixed for the payment of the price. The horse was to remain with the vendor for twenty days without any charge to the vendee. At the expiration of that time the horse was sent to grass by the direction of the buyer, and by his desire entered as the horse of one of the vendors: Held, that there was no acceptance of the horse by the vendee within 29 Car. 2, c. 3, s. 17. *Carter v. Toussaint*, T. 3 G. 4, 855

WAREHOUSE KEEPER.

See VENDOR AND VENDEE, 2.

WARRANT.

A warrant issued in pursuance of a writ de contumace capiendo stated that the defendant was attached for non-payment of costs in a cause of appeal and complaint of nullity lately depending in the Arches Court of Canterbury: Held, that this warrant was insufficient in not stating with certainty the nature of the cause, so as to show that it was one apparently within the jurisdiction of the Ecclesiastical Court. *Rez v. Dugger*, E. 3 G. 4, 791

WAY.

1. In trespass and justification under a public right of way, the locus in quo, which was not a thoroughfare, had been under lease from 1719 to 1818, but as far back as living memory could go, it had been used by the public, and lighted, paved, and watched under an act of parliament, in which it was enumerated as one of the streets in Westminster. After 1818, the plaintiff, who previously lived for 24 years in its neighbourhood, enclosed it: Held, that under these circumstances, the jury were fully justified in finding that there was no public right of way, inasmuch as there could be no dedication to the public by the tenants for 99 years, nor by any one, except the owner of the fee

- Quere*, whether there can be a public highway which is not a thoroughfare. *Wood v. Veal*, H. 2 and 3 G. 4, 454
2. By lease granted in 1814, and to take effect in June, 1820, certain houses, together with a piece of ground which was part of an adjoining yard, were leased to a tenant, together with all ways with the said premises, or any part thereof, used or enjoyed before the time of granting the lease, the whole of the yard was in the occupation of one person, who had always used and enjoyed a certain right of way to every part of that yard: Held, that the lessee was entitled to such right of way to the part of the yard demised to him. *Koozyra v. Lucas*, T. 3 G. 4, 830

WILL.

1. A testator having both real and personal estate, after giving several pecuniary legacies, bequeathed all the rest and residue of his estate and effects, whatsoever and wheresoever, to trustees, their executors, administrators, and assigns, upon trust; that they should, out of such residue of the moneys and effects that he should die possessed of, carry on, manage, and cultivate the farm then in his possession for the remainder of his term therein, for the joint advantage of certain of his sons and daughters therein named; and, at the expiration of the said term, upon further trust, to sell and dispose of such residue of his estate and effects, or such effects as should then be upon his said farm, and to divide the money arising therefrom among his said sons and daughters: Held, that the testator's real estate did not pass by this will. *Doe dem. Hurrell and Another v. Hurrell and Others*, M. 2 G. 4, 18
2. A testator by his will bequeathed the rents of one dwelling-house situate in A. to C. B. for his life; and from and after the decease of the said C. B., he bequeathed the same rents, together with the rents of all his other houses and lands unto his nephews and niece therein mentioned, for their lives and the life of the survivor; and after the decease of the survivor of them, he gave and devised all his houses and lands to trustees in trust to sell the same, and to pay the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor; and then devised all the residue of his estate to C. B.: Held, that upon the death of the testator, the nephews and niece took an immediate estate for their lives and the life of the survivor, in the rent of all the houses and lands, except the house specifically bequeathed to C. B. for his life. *Doe dem. Annandale v. Brasier*, M. 2 G. 4, 64
3. An estate in fee, upon the determination of a life estate, was devised to the wife of A. B.: A. B. was one of the attesting witnesses to the will. The testator died in 1779, and the wife of A. B. died in 1813, before the previous life estate was determined: Held, that A. B. was not a good attesting witness to this will. *Hatfield v. Thorp*, E. 3 G. 4, 589
4. A. at the time of making his will, was seised in fee of certain freehold and leasehold premises, and among the rest, of a dwelling-house, which he inhabited, in the parish of D.; and six acres of land, situate in the parish of S., a mile distant from the village of B.; and seventy acres of leasehold land, in and near the village of B.; and fifty-eight acres of freehold land, and some leasehold land in the parish of W. A., at the time of making his will, resided in the dwelling-house, and had in his own occupation all the land in the parish of W. A., and the freehold lands in the parish of S., and leasehold lands near the village of B.; but the freehold lands in the parish of D. were in the occupation of tenants. Before the making of the will A. had contracted to sell all the lands in the parish of S., and the leaseholds near the village of B. The amount of A.'s debts at the time of his death exceeded his personal property. A., shortly before his death, made a will as follows: "I direct my debts, legacies, and funeral expenses to be paid; with the due payment whereof I charge my real estates. I give to my nephew, T. G., 700*l.*, to be paid by my executor; and to my nephew, J. G. (the heir at law), 20*l.*, to be paid by my executor; and, lastly, I constitute R. G. my sole executor of all my lands for ever, and all my leasehold property here or at B., or money that shall become due for the same, paying certain annuities thereout by half-yearly payments:" Held, that by this will the executor took a fee in the freehold lands in the parish of W. *Doe dem. Gillard v. Gillard*, E. 3 G. 4, 785

WITNESS.

See EVIDENCE, 7. WILL, 3.

WRIT DE CONTUMACE CAPIENDO.

See WARRANT, 1.

WRIT OF ERROR.

See PRACTICE, 2.

END OF VOLUME V.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

OTHER COURTS.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY

WILLIAM JOHN BRODERIP, OF LINCOLN'S INN,

AND

PEREGRINE BINGHAM, OF THE MIDDLE TEMPLE, ESQRS.

BARRISTERS AT LAW.

VOL. III.

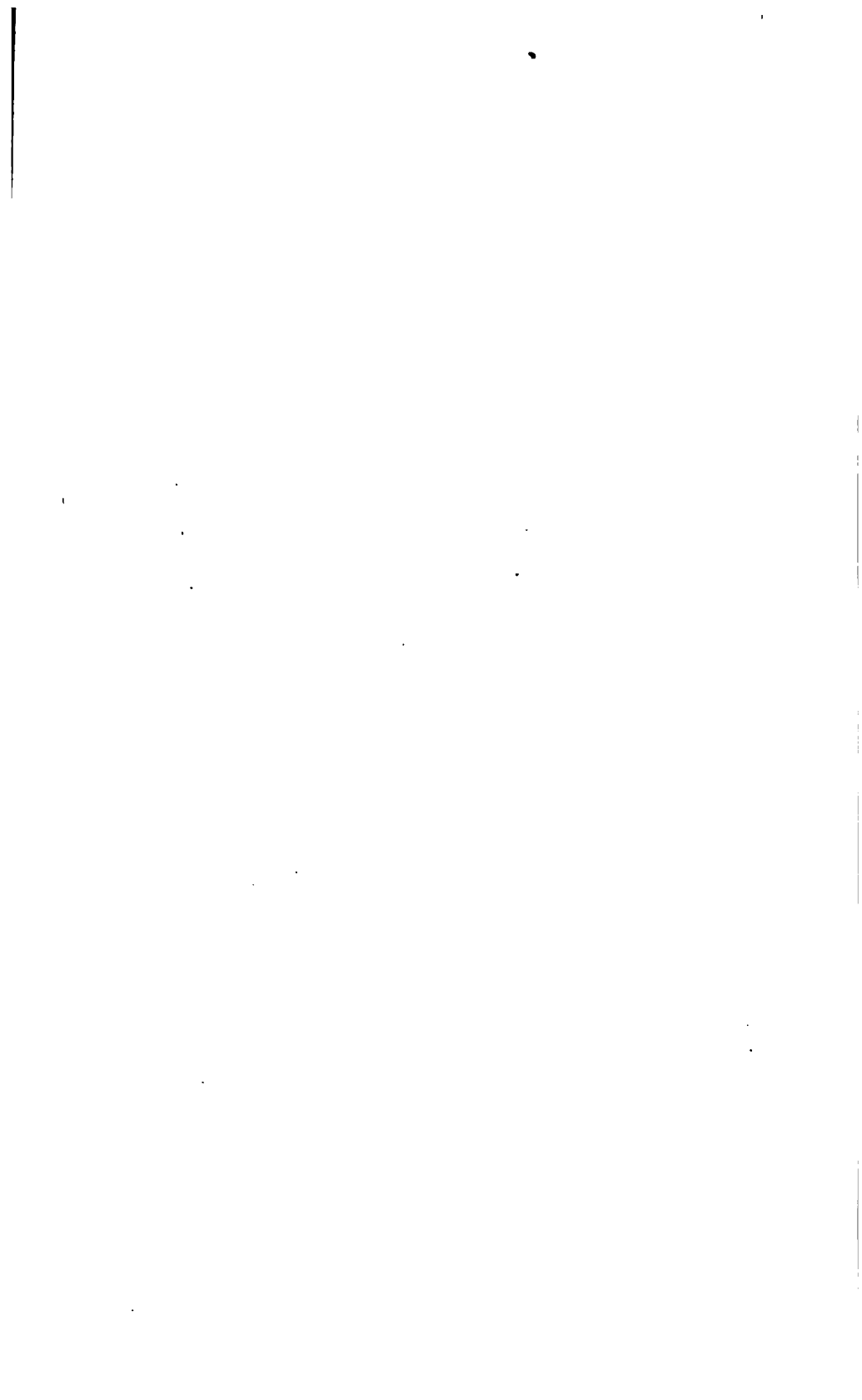
CONTAINING THE CASES FROM TRINITY TERM, 2 GEO. IV., 1821, TO EASTER
TERM, 3 GEO. IV., 1822, BOTH INCLUSIVE.

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JUDGES

OF

THE COURT OF COMMON PLEAS.

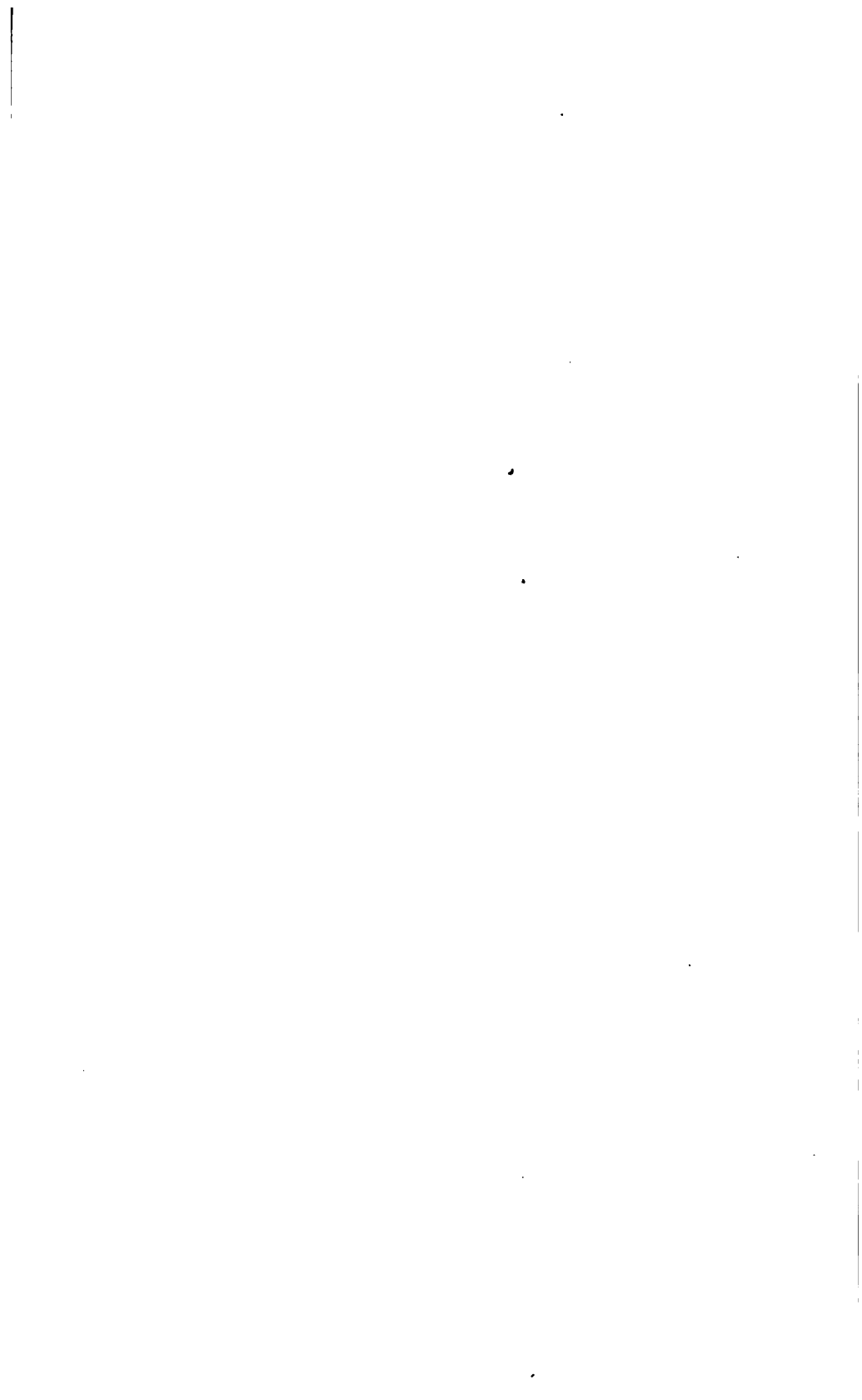
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir ROBERT DALLAS, Knt., Lord Chief Justice.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir JOHN RICHARDSON, Knt.



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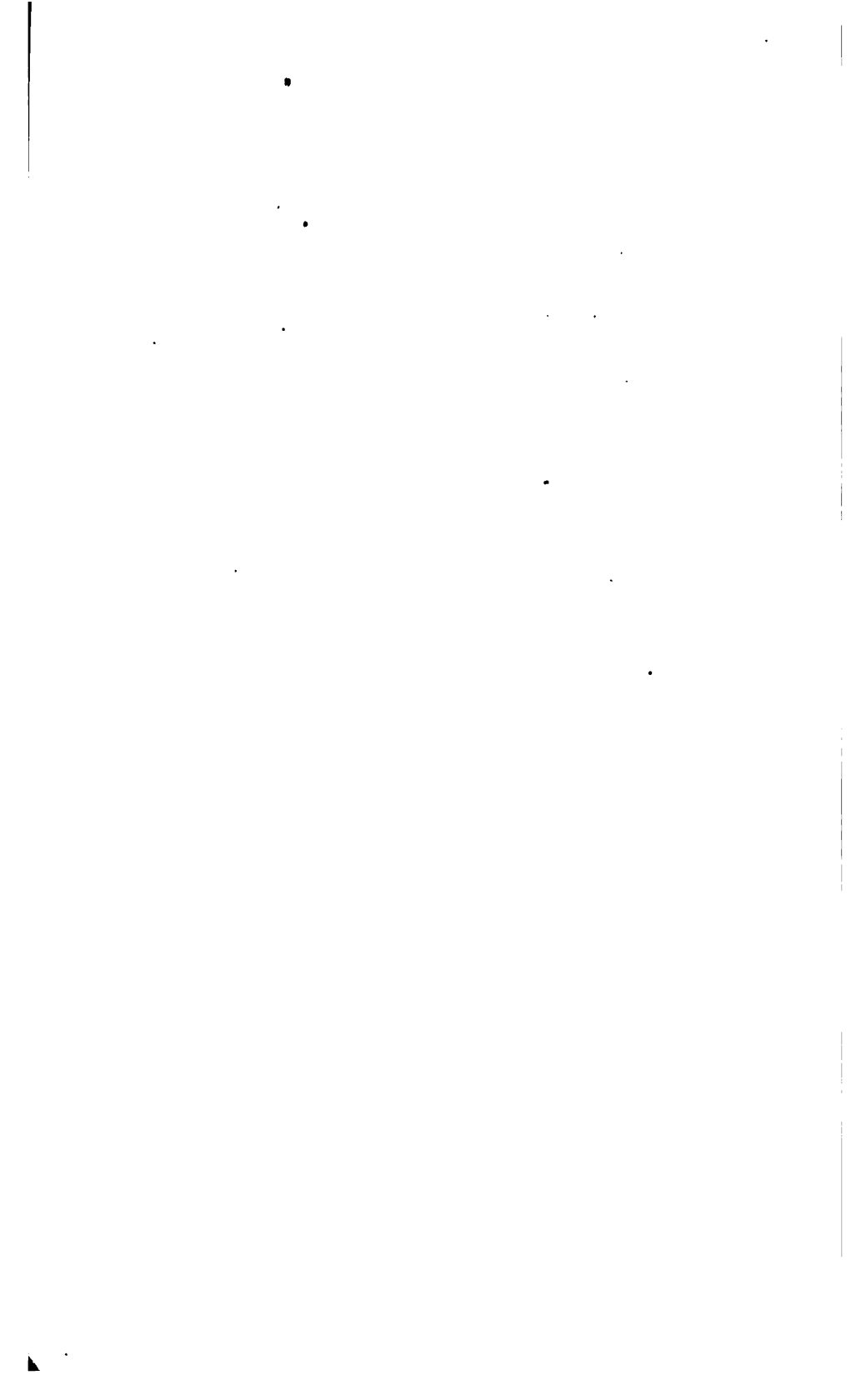
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CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
Trinity Term,
IN THE
Second Year of the Reign of GEORGE IV., 1821.

GRIFFITH v. CROCKFORD, and Another.—p. 1.

Omission to add *similiter*, is an irregularity for which the Court will set aside the verdict.

THIS was an action of replevin, to which there was an avowry and plea in bar concluding to the country. The jury having found a verdict for the avowants,

Peake, Serjt., in the last term, obtained a rule nisi to set aside the verdict for irregularity, with costs, on the ground that the avowants had carried down the issue to trial without adding a *similiter* to the usual conclusion of the plea in bar.

Taddy, Serjt., who showed cause against the rule, cited *Sayer v. Pocock*, Cowp. 407.

The Court made the rule absolute, but without costs.*

* But see 3 Wms. Saund. 319, n. 6, and Tidd. 947, ed. 6.

SUMMERSETT v. JARVIS and Owners.—p. 2.

A jury having found that a keeper of hounds, who bought dead horses for his dogs, and then sold the skins and bones for a profit, was not thereby a trader, the Court refused to grant a new trial, or to disturb the verdict.

The plaintiff, against whom a commission of bankrupt had been wrongfully issued, being required by the assignees under the commission to deliver up his books, did so: *Held*, that he might recover of the assignees in trover, without formally demanding a restoration of the books.

TROVER for sundry account-books and other property. At the trial before DALLAS, C. J., Guildhall sittings after Hilary term last, the defendants, who were assignees under a commission of bankrupt, which had been issued against the plaintiff, (a farmer, who kept hounds,) proved that he, having purchased for his hounds a number of dead horses, had been accustomed to sell the skins and bones; and, upon one occasion, said he should make a good thing of them. The plaintiff's witnesses said the dead horses were purchased expressly for the dogs, and never with any view of ulterior profit. They also proved that the defendant, Jarvis, in the character of assignee, had insisted on the plaintiff's delivering up his books, and that he thereupon delivered them; but it was not proved that the plaintiff had demanded the books of the defendants previously to the commencement of this action. The jury having found a verdict for the plaintiff, and that he was not a trader when the petitioning creditor's debt accrued,

Taddy, Serjt., on a former day, obtained a rule nisi to set aside this verdict and enter a nonsuit instead, or for a new trial, on the ground, first, that the verdict was against evidence; secondly, that the plaintiff having delivered his books for a legal purpose to the assignees, when called on to do so, had not parted with them on compulsion, so that until a formal demand was made by the plaintiff, the defendants were guilty of no conversion; and such demand having never been made, the plaintiff could not maintain his action. *Nixon v. Jenkins*, 2 H. Bl. 135.

Lens, Serjt., for the plaintiff, contended that the delivery above stated was a delivery on compulsion; that, therefore, a demand on the part of the plaintiff was unnecessary; and that the supposition of the plaintiff's having been a trader was completely disproved, because, if a man bought a thing for his own use, and happened to have more than he wanted, his selling the surplus would not make him a trader.

Taddy and *Peake*, Serjts., having been heard in support of the rule, and having referred to *Jurret v. Leonard*, 2 M. & S. 265,

The Court expressed a clear opinion that the facts of this case did not constitute a trading, within the intent of the bankrupt laws; that the defendants having taken the books when they were armed with the authority of assignees, the plaintiff must be deemed to have delivered them up on compulsion; that the defendants were thereby guilty of

conversion; and that, consequently, the plaintiff's action was maintainable, without any formal demand on his part. Rule discharged.

BUTT v. CONANT.—p. 3.

Costs.

Vaughan, Serjt., moved for a rule calling on the defendant to show cause why the plaintiff* should not be discharged out of custody, in execution for costs, the costs (as was alleged by affidavit) having been paid to the defendant by the treasury.

But the Court thought this not a sufficient ground for granting the rule, as it did not appear the costs had been paid for the plaintiff; and *Vaughan* took nothing by his motion.

* See Ante, I., 548.

WATSON v. PILLING.—p. 4.

A defendant may be declared against as administrator, though the process only describes him generally.

Hullock, Serjt., had obtained a rule calling on the plaintiff to show cause why the notice of declaration in this case, and the declaration filed by the plaintiff against the defendant, and all subsequent proceedings had thereon, should not be set aside for irregularity. The irregularity imputed, consisted in the plaintiff's having, on general process, declared against the defendant as administrator. It was admitted that, on general process, the plaintiff may declare as executor or administrator, Tidd. 150: but it was contended that the rule did not hold *e converso*; that if the present practice were held to be regular, the plaintiff would in fact declare by the by, before he declared in chief; because, if he had declared in chief, his declaration must have been against the defendant in his own right; and that such a course might greatly inconvenience an administrator, as he could not (if it were allowed) safely pay simple contract debts after the commencement of an action, and before the filing of declaration. *Lloyd v. Williams*, 2 Bl. 722, was referred to; but it was admitted there was no authority in point.

Lens, Serjt., in showing cause against the rule, argued that the object of the process being only to compel appearance, the rule must be taken to be the same with respect to plaintiff and defendant, and that a plaintiff described generally in the process might declare particularly; and he cited *Foster v. Bonner*, Cowp. 455, and *The Weaver's Company v. Forrest*, 2 Str. 1232.

Hullock was heard in support of his rule.

DALLAS, C. J. If the argument urged for the defendant were just.

a plaintiff could only declare in trespass while the process of the Court remains in its present form; and, it is admitted, there is no authority for the rule the defendant seeks to enforce. In truth, the object of the writ is only to bring the defendant into Court. It is the declaration which discloses the cause of action; and, on this short ground the rule must be

Discharged.

CAMPION v. BENYON and Another.—p. 5.

A patent was taken out "for an improved method of making sail-cloth without any starch whatever." The improvement or discovery (if any) consisted in a new mode of texture, and not in the exclusion of starch, the advantage of excluding which had been discovered and made public before: *Held*, that the patent was void, as claiming, in addition to what the patentee had discovered, the discovery of something already made public.

CASE for an infringement of patent right. Plea, general issue. The patent empowered the plaintiff, his executors, administrators, and assigns, during the term of 14 years, to make, use, exercise, and vend the invention therein mentioned; (to wit)

"A new and improved method of making and manufacturing double canvas and sail-cloth with hemp and flax, or either of them, without any starch whatever."

In which letters patent the usual proviso was contained, "That if the said Robert Campion should not particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in the High Court of Chancery, within two calendar months next and immediately after the date of the said letters patent, that then the said letters patent, and all liberties and advantages whatever thereby granted, should utterly cease, determine, and become void."

In pursuance of this provision, the plaintiff made out and executed the following specification of the invention.

"I, the said Robert Campion, do hereby describe and ascertain the nature of my said invention, and the manner in which the same is to be performed, as follows: (that is to say) my new and improved method of making and manufacturing double canvas and sail-cloth with hemp and flax or either of them, without any starch whatever, consists in first spinning the warp-yarn, either by hand or with the sort of machinery generally used for such purposes, without water or dampness of any kind whatever; afterward, properly cleansing and bleaching the same in the best manner; and, having made it perfectly dry from that process, placing and working it on a machine similar to those commonly used in cotton manufactories, round the upper bobbins on which machine the same is rolled in single threads, so as that when the said machine is put in motion in the usual manner, the effect thereof is to untwist those threads, and take out of them all the twist that was made

therein by the operation of spinning, and to twist or interweave two of them into one thread, or into half the number of other bobbins in the lower part of the said machine, the reverse or contrary way to that in which the single thread or warp had been before twisted. By this process, the yarn is not so hard twisted as at first; and, in the operation of thus reversing the twist, the fibres of the flax are so closely united, and are laid or arranged so perfectly level or even in every respect, as to render the warp-yarn or threads much stronger than any double threads are by the usual mode of manufacture with starched chains. The double threads or warp-yarn being thus prepared and twisted together into one chain or warp, the same is thereby preserved from injury whilst passing through the hay-walk in the subsequent operations of weaving; and thus, the necessity of using any starch, or substitute for starch whatever, which, in the ordinary mode of manufacture is used only for the purpose of winding the two threads or warp, and making them smooth, so as to pass through the hay-walk with facility and without injury, is altogether superseded. The canvas thus manufactured is much more pliant than what is made with starch, or in any other manner, and is stronger, not only because its being so very regular and even, necessarily makes the stress equal in every part, but because, in consequence of there being no starch used in the manufacture, the weight of that material, which is considerable in every web or piece, must be supplied by an additional quantity of warp and woof, and being soft and pliant it will thicken when used, and become of a closer texture, without breaking or running up, or being liable to mildew or turn black. Where hemp is used in the manufacture, I hackle the same with soft soap, and a very small proportion of oil, in preference to the entire use of oil, as generally practised; for this preparation lays the fibres as even as oil does, and at the same time counteracts the viscous qualities of the hemp, and, with a proper quantity of pearl or potash, assists in bleaching the yarn, and obtaining a good colour in that process; the advantages of my invention, of course, extend to canvas made of unbleached yarn; and the only difference in the manufacture thereof, is the process of bleaching being then dispensed with."

At the trial, before DALLAS, C. J., (London sittings after last Hilary term,) it was proved, that double sail-cloth had been made without starch ever since the year 1803, particularly by Mr. Dempster, and that the exclusion of starch was an improvement of great importance. But the plaintiff's witnesses deposed, that his process for making unstarched sail-cloth was new, and different from the process pursued by the defendant for making unstarched cloth, particularly as to reversing the original twine; and that by this means the plaintiff produced a better article. Some of the defendant's witnesses denied that the process pursued by the plaintiff differed from the defendant's process. One of them said the process of reversing the twine was far from being new or original, and that the wrapper of an Egyptian mummy, which he had examined, was woven in the same manner.

Dempster's specification was as follows: "Instead of using single yarns not twisted, but glued together with starch or other mucilage, in order to form the warp of the canvas, as is now commonly done, to

the great injury of the article, rendering it liable to spontaneous destruction by mildew, I use twine, composed of two or more yarns of prime material of equal size and strength, both for the warp and woof, and I am by that means enabled to weave, and I do weave my canvas without starch, or any other mucilage whatever, and I do thereby produce an article nearly twice as strong as common canvas of the same weight and fineness, and with the advantage, that its threads have an equal bearing on one another, in all directions; not liable, like the common canvas, to split longitudinally, being much stronger in the cross direction, not capable of rot or mildew from the presence of mucilage, and extremely durable, because it is subject to no irregular action of sharp cutting threads on its woof, but it is only exposed to the fair, slow, and gradual wear of its well combined and duly proportioned component parts, which maintain their relative strength to the last."

The jury found a verdict for the plaintiff.

Lens, Serjt., on a former day, obtained a rule nisi to set aside this verdict and enter a nonsuit, or have a new trial, on the ground (among other objections to the verdict) that the patent was taken out for more than the plaintiff could claim as his own discovery; the patent appearing to claim for the plaintiff the discovery of the process of making sail-cloth without starch.

Vaughan and *Pell*, Serjts., now showed cause against the rule, and contended, that though there might have been some colour for the objection, if the patent had been taken out simply for a method of making sail-cloth without starch, yet that the plaintiff having taken it out for an improved method of making sail-cloth without starch, showed clearly, that he did not claim the original discovery of the advantage of rejecting starch, but a mere improvement in the fabric of unstarched cloths; and that the language in which patents for improvements on the discoveries of others were usually framed, corresponded with the expressions here employed.

Lens and *Hullock*, Serjts., in support of the rule, contended, that the language of the patent, "an improved method of making sail-cloth without any starch *whatever*," showed that the plaintiff intended to claim the discovery of the advantage of rejecting starch, as well as an improvement in the fabric of the unstarched cloth. If he had intended to claim only the discovery of an improved mode of fabricating unstarched cloth, he should have called his invention "an improvement in the method of making, without starch, double sail-cloth." [*RICHARDSON, J.* In some specifications the party goes on to say, such things I do not claim.] The patent should have been confined to what the plaintiff could call his own; and if it contains something of his own and something of another's, it is bad, because it claims too much, or even because of the very ambiguity as to the extent of what the patentee is entitled to. *Turner v. Winter*, 1 T. R. 602; *The King v. Arkwright*, Bull. N. P. 77, 6th ed.; *The King v. Else*, 11 East, 109; *Hill v. Thompson*, 3 Merivale, 629, 2 B. Moore, 424, S. C. VIII.; *Taunt; Macfarlane v. Price*, 1 Starkie, N. P. C. 199; *Lord Cockrane v. Smethurst*, 1 Starkie, N. P. C. 205.

DALLAS, C. J. What is the fair import of this patent as compared

with the specification, is now the only question for us to decide, it being unnecessary to enter into any other. With respect to patents, every patent being a monopoly, that is, an infringement of public right and having for its object to give the public warning of the precise extent of the privilege conferred on the patentee, the Court (without going into the controversy whether it is politic that such privileges should be conferred or not,) is bound to require that such warning should be clear, and accurately describe what the inventor claims as his own. If the instrument contain any ambiguity on a material point, that is a ground on which it may be avoided altogether.

Having premised thus much, let us see for what the present patent is granted. It is agreed that the instrument is not altogether a subject of legal, but in some degree of grammatical construction; for, if the instrument be chargeable with grammatical ambiguity, it cannot give that clear description which every man who reads may understand. The patent is "for a new and improved method of making and manufacturing double canvas and sail-cloth with hemp and flax, or either of them, without any starch *whatever*." On reading this, how is a common person to decide? The discovery claimed is not simply a method of making double canvas and sail-cloth, but a new and improved method; and in what is this new and improved method stated to consist but in the making the cloth without any starch whatever? From the time I first read the patent down to the present day, I thought that the object of the patentee was to make cloth without starch. Then as to the specification, if that be different from the patent, the whole is void; if it coincides, it is open to the same objection as the patent. But the specification, after describing the operation of spinning, and after stating that thereby the necessity of using any starch, or substitute for starch whatever, is superceded, proceeds to allege that "the canvas thus manufactured is much more pliant than what is made with starch, or in any other manner; and is stronger, not only because its being so very regular and even, necessarily makes the stress equal in every part, but because in consequence of there being no starch used in the manufacture, the weight of that material must be supplied by an additional quantity of warp and woof; and being soft and pliant, it will thicken when used, and become of a closer texture, without breaking or running up, or being liable to mildew or turn black." Whether we look to the patent or the specification, I have no doubt that the claim of the plaintiff is too extensive: it is not confined to an improved method of weaving the cloth or twisting the threads, but also comprehends another mode of proceeding, which is not a new discovery.

PARK, J. There can be no doubt that ingenious men, who incur labour and expense in the production of inventions advantageous to the public, have a fair claim to be indemnified by the exclusive privilege of a patent. But, on the other hand, it is important that the public should have the means of turning such inventions to account, after the inventor has been satisfied for his trouble; and it is for this reason, among others, that every patent ought to contain a clear statement of what the party has accomplished. An unlettered person, who read this patent, would conceive that the patentee's improvement consisted in manufacturing

sail-cloth without starch. But, in order to see with more precision what the party meant to claim, we must look to the specification; and this it is impossible to read, without thinking, that the omission of starch was the principal part of the improvement which the patentee meant to claim as his own. In his process, he tells us the necessity of using starch is superceded, and mildew thereby entirely prevented. But if he only meant to claim as his own, an improved mode of texture or twisting the thread, to be applied to the making of unstarched cloth, he might have guarded against ambiguity by disclaiming, as his own discovery, the advantage of excluding starch. Proceeding on the specification, it is impossible that this patent can be supported; for though a patent for an improvement on an old discovery may be sustained, a patent which, in addition to the merit of the improvement, claims the merit of the old discovery, can never be permitted to vest in the patentee an exclusive privilege for the old discovery.

BURROUGH, J. All the cases, and the reason of the thing, show that a patent can only be sustained for a new discovery; and the specification must support the patent. Now, what is this patent for?—"A new and improved method of making and manufacturing double canvas and sail-cloth, without any starch whatever." And what has really been the discovery, if it be a discovery?—"A new method of preparing or twisting the hemp or flax; and the patent should have been taken out for that alone. I am clear that this is bad on the title, the patent, and the specification: the king has been deceived, and the patent is void.

RICHARDSON, J. The plaintiff must be nonsuited, on the ground that the patent is taken out for more than he has discovered. On this point, the law is clear. If the specification had guarded against misapprehension on the part of the public, by stating that the patentee claimed no merit for the exclusion of starch, it is not impossible but that the patent might have been valid. The principle is, that though ingenious men ought to be rewarded for their discoveries, the public at large and other ingenious men ought not to be restrained from doing whatever is not peculiar to the process employed by the patentee. The specification in this case, from beginning to end, refers to the advantages to be derived from the exclusion of starch in the manufacture of sail-cloth; and as that is not a discovery which the plaintiff can call his own, his patent cannot be sustained.

Rule absolute for a nonsuit.

JENKINS and Another v. REYNOLDS.—p. 14.

"To the amount of 100*l.* consider me as security on J. C.'s account (signed and dated.)"
Held, not a sufficient memorandum (under 29 Car. 2, c. 3, s. 4.) of an agreement to pay for the default of J. C.

In this case, the first count of the declaration stated, that, on the 27th April, 1815, in consideration that the plaintiffs, at the request of the defendant, would sell and deliver on credit, to James Cowing and

Co. certain goods, wares, and merchandises, the defendant undertook and promised the plaintiffs to be security to them on the account of the said James Cowing, by the style, &c., of James Cowing and Co., to the amount of 100*l*. That the plaintiffs confiding in the promise, did afterwards, on divers days and times, sell and deliver to Cowing, on certain credit, agreed upon between the plaintiffs and the said Cowing, divers goods, wares, and merchandises, amounting in the whole to 300*l*.; and that although the said credit and time of payment had long since elapsed, Cowing had not paid, whereof the defendant had notice; yet that he had not paid the plaintiffs the said sum of 100*l*., or any part thereof, but the whole remained due. The second count stated, that, in consideration that the plaintiffs, at the like request of the defendant, would sell and deliver on credit to Cowing, certain other goods, &c., the defendant undertook and promised the plaintiffs to be accountable to them for the payment, by Cowing, of the price of such last-mentioned goods, to the amount of 100*l*. The count then proceeded with similar averments, as in the first count, and assigned breach accordingly. The declaration also contained counts for goods sold and delivered, and money paid, laid out, and expended by the plaintiffs to the defendant's use, and on account stated.

The defendant having pleaded the general issue, the cause came on to be tried before DALLAS, C. J., at the Westminster sittings after Hilary term, 1820, when a verdict was found for the plaintiffs, damages 100*l*., subject to the opinion of the Court on the following case, with liberty to the defendant to move to enter a nonsuit. A motion was accordingly made, and a rule to show cause granted, which rule coming on in last Hilary term, the Court ordered the question to be brought before them on the following case.

The plaintiffs are Manchester warehousemen, and had had dealings with James Cowing, who had carried on business in the style and firm mentioned in the declaration, and had become bankrupt shortly before April, 1815. On or about the 27th April, 1815, Cowing delivered the following letter, which was written and signed by the defendant, to the plaintiffs, viz.:

“To Messrs. Jenkins and Jones

“Gentlemen,

“To the amount of 100*l*., be pleased to consider me as security on Mr. James Cowing and Co.'s account.

“I am, gentlemen, your obedient servant,

“Samuel W. Reynolds, 47, Poland Street.”

1815, April 27.

Subsequently to the delivery of this letter to the plaintiffs, they supplied Cowing with several parcels of goods on credit at several times, between the 27th of April, 1815, and the month of September, 1819, to a large amount, and in the month of September, 1819, Cowing again stopped payment, and there being upwards of 200*l*. due from him to them on account of goods supplied, this action was brought, for the purpose of recovering 100*l*. from the defendant, by virtue of and under his letter of the 27th April, 1815, and the question for the opinion of the Court is—

Whether the plaintiffs are entitled to recover that sum from the defendant? If the Court should be of opinion that the plaintiffs are entitled to recover in this action, the verdict is to stand; but if the Court should be of a contrary opinion, then a nonsuit is to be entered.

Peake, Serjt., for the plaintiffs. Before the passing of the statute of frauds, any promise by one person to pay the debt, or answer for the miscarriage of another, would have been binding, though there was no written evidence of the promise; and the act was passed, not to vary the liability of such a party, but merely to alter the evidence by which such liability should be established. The intention of the framers was, to save a party from being charged, by perjury, with a contract to which he might be an entire stranger; and it should seem, therefore, that any memorandum, however scanty, if signed by the party to be charged, would completely exclude the mischief proposed to be obviated by the statute. A consideration, indeed, is necessary to the validity of the promise, at present, as well as before the statute was passed; but that consideration being stated in the declaration, and duly proved, the object of the statute, with respect to evidence of the mere existence of the agreement, is sufficiently answered by a bare memorandum of the contract. It can be no more necessary to set out the whole agreement under the 4th section than under the 17th section of the statute, and under that section it has been expressly decided,* that a bare memorandum signed by the party is sufficient. It should seem, therefore, that *Wain v. Warlters*, 5 East, 10, where a different doctrine is held, cannot be well decided. *Stadt v. Lill*, 9 East, 348, and *Bateman v. Phillips*, 15 East, 272, are authorities in favour of the plaintiffs; and in *Goodman v. Chase*, 1 B. & A. 299, ABBOTT, J., says, "Suppose a promissory note in these words, *I hereby agree to pay the bearer 20l.*, would not that be a good negotiable security, and available in law?" It seems, from *Morris v. Stacey*, 1 Holt, N. P. C. 154, that GIBBS, C. J., disapproved of *Wain v. Warlters*; and in *Ex parte Minet*, 14 Ves. jun. 190, Lord ELDON has directly impugned *Wain v. Warlters*; and though it may be difficult to understand what is there said about considerations, Lord ELDON probably meant, it was not necessary that, in cases of this description, there should be a beneficial consideration moving to the defendant. In *Ex parte Gardom*, 15 Ves. jun. 288, he implies, that it is immaterial whether the consideration to the defendant appear on the writing. If the word agreement, in the fourth section of the statute, is to be taken in its strict sense, as implying the whole terms of the contract, then are all the cases in equity, enforcing agreements signed by a single party, wrongly decided; as *Bird v. Blosse*, 2 Vent. 361, *Moore v. Hart*, 1 Vern. 110, *Seton v. Slade*, 7 Ves. jun. 265, *Fowle v. Freeman*, 9 Ves. jun. 350. At all events, it may be contended, that the consideration here is sufficiently expressed, when it appears to be the giving credit to Cowing.

Hullock, Serjt., for the defendant. The consideration for the defend

* *Egerton v. Matthews*, 6 East, 307.

ant's promise nowhere appears. Before the statute, a promise without consideration would have been void, and the reducing such a promise to writing, under the direction of the statute, will not render it valid. *Forth v. Stanton*, 1 Saund. 209, *Rann v. Hughes*, 7 T. R. 350 n. Therefore, if this agreement had been put on record, it would have been bad in arrest of judgment; any parol evidence of an agreement with a sufficient consideration, would have been a variance from the contract stated on record, and, if admitted, might have let in all the mischief which the statute proposes to prevent; for perjury concerning the consideration, might cause as much injustice as perjury concerning the existence of the agreement. Memoranda under the 17th section of the statute always refer to the object of sale, and therefore include the consideration. *Lyon v. Lamb*, Fell on Merc. Guar. 260, 2d ed. In all the cases in Chancery touching specific performance, the letters on which the decree has turned state the terms of the agreement. The consideration also appeared in *Bird v. Blossie*, and *Fowle v. Freeman*. As to *Ex parte Minet*, it is impossible to understand what the Chancellor is there made by the reporter to say about considerations, the doctrine laid down being contrary to the uniform course of the common law. *Sadler v. Hawkes*, 1 Roll. Ab. 27, pl. 49. But *Ex parte Minet* and *Ex parte Gardom* are the same in effect as *Stadt v. Lill*, where the consideration sufficiently appears. So that there seems to be no reason for impugning the authority of *Wain v. Warlters*, which has been expressly upheld in the late case of *Saunders v. Wakefield*, 4 B. & A. 595.

Peake was heard in reply.

DALLAS, C. J. This question arises on the construction of the fourth section of the statute 29 Car. 2 c. 3, s. 4, and it has been considered on two grounds; first, as if it were an original question, on the construction of the statute; secondly, not as an original question, but at a point already affected by various decisions.

I shall consider it first on the first ground; and, the question turning on the construction of a statute, we must have recourse to those rules by which the intent of statutes of doubtful meaning is usually expounded; we must, therefore, consider what the law was previously to the passing of that statute. It is agreed that previously to the passing of that statute, no writing was necessary for the validity of a contract such as the present, and it is also agreed that, before the passing of the statute as well as since, a consideration was necessary. That being so, and considering the object of the statute, let us see whether the statute has made any difference between a promise and its consideration, so as to fall into this inconsistency, that, while it requires the promise to be in writing, it allows the consideration for it to be committed to oral testimony; and it seems to me that this would be a strong conclusion to come to, because, if the design of the statute were to obviate the mischief of perjury, that design would not be accomplished unless the consideration, as well as the promise, were reduced to writing. However, we must recur to the words of the statute; they are, "No action shall be brought whereby to charge the defendant upon

any special promise to answer for the debt, default, or miscarriage of another person,—unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.” Now, on the one side, it is contended, that promise and agreement in this clause are synonymous, and that a promise in writing to pay the debt of another, is in fact the agreement or undertaking to do so; but that depends on the construction of the word promise, accompanied as it is by the words at the end of the clause, and upon those words there is the same reason for having the consideration in writing, as for having the promise in writing, because the consideration is part of the agreement between the parties. I should say, as was said by LAWRENCE, J., in *Wain v. Warlters*, “If the question had arisen merely on the first part of the clause, I conceive that it would only have been necessary that the promise should have been stated in writing; but it goes on to direct that no person shall be charged on such promise unless the agreement, or some note or memorandum thereof, that is, of the agreement, be in writing; which shows that the word agreement was meant to be used in a sense different from promise, and that something besides the mere promise was required to be stated. And as the consideration for the promise is part of the agreement, that ought also to be stated in writing.” But the statute seems to me to distinguish between promise and agreement; for, unless such distinction had been intended, it would have been material to say, that no action should be brought on any promise, unless the promise were in writing; but, instead of adopting the word promise in the last part of the clause, the legislature has employed a different word, namely, the word agreement, and no one can say that promise and agreement are the same in their popular signification. In the construction of the clause, the terms to be attended to are, promise, agreement, and memorandum in writing. What is an agreement, but the consent of two persons to the same thing?—and, to render that valid, there must be a consideration. If, therefore, agreement means more than promise, the agreement itself, or some note or memorandum of it must appear; by memorandum, I mean not the whole detail of what has been agreed on, but such a note as to render oral testimony unnecessary, towards proving what is of the essence of the contract.

Therefore, without going through the authorities, I am of opinion that the consideration does not appear upon writing, and that, therefore, the terms of the statute have not been complied with: but, without any invidious distinction, the weight of the authority is this way; first, in *Wain and Warlters*, then in *Lyon v. Lamb*, and now lately in *Saunders v. Wakefield*.

PARK, J. Agreeing as I do in all that has fallen from my Lord Chief Justice, it is not necessary for me to consider the question before us at great length; but looking at the statute, I should say that no doubt could exist on the subject. If, before the passage of the statute, a consideration was necessary to the validity of an agreement, it would be singular, if the object of the statute was to exclude perjury, that

the consideration should not be reduced to writing as well as the promise; although, therefore, the rule of law was so far altered by the statute, as to render writing necessary, where oral testimony would have sufficed before, yet all that was essential to be proved before by oral testimony, must now appear on the face of the writing.

It has been argued, that there are no grounds for any distinction between the matters disposed of in the 17th section of the statute, and those mentioned in the 4th. But as the 17th relates to the sale of property, the memorandum under that section must show the consideration when it refers to the subject of sale; while, under the 4th section, which relates to contracts for the benefit of a third person, the consideration cannot be known unless distinctly expressed, and it is this circumstance which manifestly distinguishes *Wain v. Warlters* from *Egerton v. Matthews*. To advert to the case of *Wain v. Warlters*. The judges who decided that case were all of them persons of great eminence, and the matter was duly considered. They all go at length into the question, and come to a clear conclusion, that the consideration must appear. I do not go into the question, whether the fact was well decided in *Wain v. Warlters*, (because there may be different opinions, as to whether or no a consideration did appear on the instrument which was there the subject of discussion,) but on principle the decision was right. In *Egerton v. Matthews*, the judges do not shake the decision in *Wain v. Warlters*, and *Egerton v. Matthews* came on some time after *Wain v. Warlters* had been the subject of general discussion. Then, in 1807, came *Lyon v. Lamb*, in which the judges were unanimous, (whether they were right as to the fact, whether or no a consideration did in that case actually appear, I do not say,) but on principle they held, that the consideration must appear. The Lord Chief Baron says, (Fell on Merc. Guar. 260,* 2d ed.) "a promise may be voluntary, but an agreement to be binding must contain a mutual engagement upon an adequate consideration: and to prevent frauds and perjuries within the meaning and scope of the statute, such engagement and consideration should be in writing; otherwise a door is open to all the evils which the statute was meant to remedy."

In *Saunders v. Wakefield*, four new judges of the King's Bench have just determined, that an agreement on which the consideration does not appear is void under the statute, and they have expressly upheld *Wain v. Warlters*; so that here are twelve judges all concurring in the same opinion. It is urged, indeed, that we decide against the opinion of a very learned person in another court, but in all the cases decided by him, the consideration has as sufficiently appeared, as it did in *Stadt v. Lill*, *Bateman v. Phillips*, and *Morris v. Stacey*. We have also been pressed with the opinion of GIBBS, C. J., but in *Morris v. Stacey*, where that opinion is given, the consideration appeared, and the opinion itself is by no means clear or decisive. As no consideration whatever is expressed in the present case, the promise might have been made to cover a gambling debt, or any other transaction of the most improper description. The inclination, therefore, of my mind is, to support the decision of *Wain v. Warlters*.

BURROUGH, J. It is not necessary for us to refer to the case of *Wain v. Warlters*; we may act on the principle; and the principle is, that the substance of the agreement must appear on the memorandum. Now, the consideration is the most material part of the substance of the agreement; but in this agreement there is no statement of any consideration whatever, so that if an agreement with a consideration had been given in evidence, the agreement described in the declaration would have varied from the agreement so given in evidence. The case of *Wain v. Warlters*, (if it were necessary to refer to it,) has been acted on by twelve judges, and are we to say that they have been all mistaken? I am of opinion, that the plaintiffs are not entitled to recover.

RICHARDSON, J. The object of the statute of frauds was to prevent perjury or subornation of perjury, by causing that to be reduced to writing, which before might have been proved by oral testimony, and such a construction ought to be put on the clause in question as will best effect the intentions of the legislature. Now, is this memorandum such as will satisfy those intentions? On the face of the memorandum, it does not appear whether the agreement relates to a past or a future transaction; it might apply to either, or even to an illegal debt; whatever is necessary to render it available must be supplied by oral testimony, and with that view the declaration is framed, stating the promise to have applied to a future supply of goods. Supposing that to have been so, and suppose the plaintiffs, instead of supplying goods had advanced money,—that would not have fallen within the intention of the guaranty, but it would have rested altogether on the conscience of the witness, to say whether the guaranty applied to the one or the other; and parol evidence so let in would lead to the very perjury, or subornation, which it was the object of the statute to exclude. The statute requires that the substance of the cause of action should appear in writing, and the consideration is the substance of an agreement. But they who framed the clause were aware that it would be dangerous to leave the word agreement unaccompanied, because, that might have occasioned difficulty through excess of strictness; they, therefore, allowed a memorandum of the agreement to be made, which, though it should not state the whole agreement in detail, should sufficiently disclose the substantial cause of action. And this is the meaning of what fell from the Court in the case of *Wain v. Warlters*. It is not necessary now to decide, whether the application of the principle was right, but whether the principle itself recognized in that case was right. In *Stadt v. Lill*, it was decided, that a guaranty did satisfy the terms of the statute, because the guaranty imported, that the promise was made concerning a delivery of goods, and that would be a good consideration. So in, *Bateman v. Phillips*, the consideration was sufficiently shown; but it has been urged, that in *Egerton v. Matthews*, a construction has been put on the 17th section of the statute, different from the construction put on the 4th. I think not; nor was that necessary, for the consideration of the promise sufficiently appeared in the case. The words

of the 17th section are, "That some note or memorandum in writing of the bargain he made and signed." Suppose a person on buying goods were to give as a memorandum, "I will pay 50*l*." I think that would not be a good note of the bargain under the 17th section; but in *Egerton v. Matthews*, the ground of the promise was sufficiently shown, so that, by that case the Court of King's Bench have not shaken the case of *Wain v. Warlters*. *Lyon v. Lamb*, and *Saunders v. Wakefield*, are both in point, and the latter is very near the present case, though perhaps the note or memorandum in *Saunders v. Wakefield*, is the more full of the two. As to the *dictum* of the Lord Chancellor, I do not find any decision of his conflicting with the doctrine now laid down: no equity case has been cited inconsistent with *Wain v. Warlters*, as the consideration has appeared in all of them. Neither the judges who decided *Wain v. Warlters*, nor those who have upheld that case, ever meant to say that both parties should sign the agreement, but only the party to be charged by it, and that the consideration should sufficiently appear. No consideration appears on the agreement in this case, and therefore, there must be a

Judgment of nonsuit.

ADAMS, Gent., v. LUCK.—p. 25.

Amendment.

THE Court allowed *Hullock*, Serjt., (on payment of costs and the costs of the rule by the plaintiff,) to amend, (See *Walker v. Hawkey*, 5 Taunt. 853,) the return of his attachment of privilege in this cause, which *Vaughan*, Serjt., on the authority of *Miles v. Bond*, 1 Str. 399, and *Kenworthy v. Peppiat*,* had obtained a rule nisi to set aside for the irregularity of being returnable after the essoin day and before the *quarto die post*, instead of being returnable on a day certain in full term.

* 4 B. & A. 288. In this case the amendment was refused.

FRANCIS v. NEAVE, Bart., Sheriff of ESSEX.—p. 26.

In action for an escape, the sheriff's authority for appointing a bailiff, was proved by a person belonging to the sheriff's office, who had endorsed the bailiff's name on the writ produced: a verdict having been found for the plaintiff, the Court refused to set it aside, holding this proof was sufficient.

THIS action against the sheriff of Essex for an escape was tried before Wood, B., at the last Essex assizes, when the defendant was connected with the officer by whom the escape was permitted, by a witness who produced the writ, and said he belonged to the sheriff's office; and the writ came to the office from the plaintiff's agent, marked with the bailiff's name, and that he (the witness) again endorsed the

bailiff's name on it. The writ produced bore the two endorsements. A verdict having been found for the plaintiff,

Taddy, Serjt., in the last term, had obtained a rule nisi to set aside this verdict and enter a verdict for the defendant, on the ground that the sheriff could only be connected with the execution of the writ in question, by showing that he had authorized the bailiff who put it in force, (*Hill v. Sheriff of Middlesex*, 7 Taunt. 8,) and that in order to show such authority, the officer ought to have been called, or his warrant produced.

Pell, Serjt., *contra*, contended that such authority was sufficiently shown, by the circumstance of the writ having been seen in the sheriff's office with the bailiff's name on it.

Taddy having been heard in reply,

The Court thought the sheriff's authority sufficiently proved; and having referred to *Fermor v. Philips*,* discharged the rule.

Rule discharged.

* The Reporters have procured the following note of this case from a gentleman at the Bar.

FERMOR v. PHILIPS, Esq., Sheriff of OXFORDSHIRE.

In an action for an escape, the writ in the former action being produced, bearing an endorsement purporting to record the sheriff's delivery of a warrant to B., and B., on being called, stating that he had delivered the warrant to another, who did not produce it: *Held*, that it ought to have been left to the jury to say whether B. acted under the sheriff's authority

ACTION for an escape, tried before BURROUGH, J., Middlesex sittings after Hilary term, 1817.

On the writ in the former action (which was produced to connect the defendant with his bailiff) were endorsed the words, "Warrant to Bloxham, 6th November, 1816." Bloxham, who was called, said he had delivered the warrant to a person who did not produce it. BURROUGH, J., was of opinion that the endorsement on the writ was not sufficient to connect the sheriff with Bloxham, and the plaintiff was nonsuited.

On a motion for a new trial in Easter term, 1817, this Court *held*, that it ought to have been left to the jury to say whether Bloxham acted under the authority of the defendant, the endorsement on the writ being *prima facie* evidence that he did so act.

POCOCK and Another, v. GEORGE BISHOP of LINCOLN, and Others.—p. 27.

"I do give to my son R. the perpetual advowson of H. B., in Leicestershire, and my manors of S., and all my lands in Northamptonshire: *Held*, by three Judges, (PARKER, J., *dissentiente*), that this devise gave only an estate for life in the advowson to the son R., though he at the time of making the will, was incumbent of the living.

Quare impedit. The plaintiffs, by their declaration, claimed through several mesne conveyance, the advowson of Husbands Bosworth under Thomas Pearce, heir of Richard Pearce (the father.) The plea stated, that Richard Pearce, (the son,) having been presented by his father on the 2d September, 1790, was incumbent of Husbands Bos-

worth at the time of a devise bearing date the 20th May, 1795, by which devise Richard Pearce, (the father) gave and disposed of all his worldly goods as follows: To his son Thomas the manor of Flamstead, and all his lands in the parish of Radburn, and all rents that should be due at his death: but if no children should be born in wedlock, then he gave the above to his son Richard; and if he should have no child born in wedlock, then he gave all his lands and estates in the counties of Hertford and Middlesex to his daughter, and her heirs; the will then contained the following words; "I do give to my son Richard the perpetual advowson of Husbands Bosworth, in Leicestershire, and my manor of Stanwick, and all my lands in Northamptonshire." Then followed a devise to his son Zachary, of all the devisor's freehold houses, and all his lease houses, at his death, that were no part of the *trale*; and, after other legacies, the devisor gave all his South Sea annuities to his son Richard, &c. The plea further stated, that Richard, (the father,) died on the 10th January, 1800, and that the son Richard took under the will an estate in fee in the advowson, and by will devised the advowson to the defendants, their heirs and assigns, and that Richard the son died; whereupon the defendants became seized, for which reason, &c. Special demurrer and joinder. The question was, whether the devise of the perpetual advowson of Husbands Bosworth to the son, Richard Pearce, above set forth, gave an estate in fee to the said Richard.

The case was argued on a former day in this term, by *Bosanquet*, Serjt., for the plaintiffs, and *Vaughan*, Serjt., for the defendants.

Argument for the plaintiffs. Richard only took an estate for life in the advowson. Conveyances of advowson are subject to the same rules as conveyances of land, tithes, or common, Co. Litt. 4 a, in which more than a life estate does not pass, unless words of inheritance are employed: but there is nothing in the word *advowson* itself which in a deed would pass a fee, and a will is construed in the same manner as a deed, unless some intention which such a mode of construction would defeat, plainly appears in the will. *Davis v. Kemp*, Carter, 5, 6. *Wild's case*, Rep. 16. *Bale v. Coleman*, 8 Vin. Abr. Devise, D. b, pl. 7. No such intention appears on this will; as it has already been decided with respect to the lands and manors which are mentioned in the same sentence, *Doe dem. Crutchfield v. Pearce*, 1 Price, 364; and the heir at law can only be disinherited by express words, *Denn v. Gaskin*, Dougl. 759.* It is clear that a devise of tithes, right of common, or any incorporeal hereditament, would not pass a fee, unless accompanied by words of inheritance, or words equivalent thereto. And so it must be if the devise were simply of an advowson. Here, indeed, a question is raised on the expression "perpetual advowson;" but the word *perpetual* joined to *advowson* is only a description† of the thing in which the devisor had an inheritance, not a description of his inheritance in the thing. An advowson is not styled perpetual, because the patron has a *fee* in it, but because

* See 1 Roberts on Wills, 496, &c., where the cases on introductory words are collected.

† Per Bayley, J., in *Doe v. Wood*, 1 B. & A. 523.

the order of presentation is uninterrupted in one person: the patron may have a fee where he does not enjoy the perpetual right of presentation; as where the advowson has gone to parceners, and the several patrons have a fee in their alternate right of presentation. So, on the other hand, the patron may limit a perpetual advowson for a term of years, the effect of which will be to give the lessee the uninterrupted right of presentation during that term. The cases on the word *hereditament*, in principle, bear directly on this point. No word of itself seems more expressly to point to an inheritance. Yet a devise to A. of all hereditaments gives him only an estate for life. *Denn v. Mellor*, 5 T. R. 58. *Doe v. Allen*, 8 T. R. 503. If a devisor were to devise "his fee farm rents," without more words, only an estate for life would pass, *aliter* if he were to devise his rents in fee. In *Loveacres v. Blight*, Cowp. 352, the words, "freely to be possessed and enjoyed," were held to carry a fee, because the estate was charged with payments; but the Court of King's Bench held, that where there was no charge, only an estate for life passed. *Goodright dem. Drewry v. Barron*, 11 East, 220. The same principle applied to reversions, appears in *Peiton v. Banks*, 1 Vern. 65. It may be urged, that, as Richard was already incumbent, if he did not take a fee by the devise, he was not benefited by it; but being only incumbent, and not tenant for life of the advowson, he was enabled by this devise to vacate and present, and so, perhaps, to provide for a son.

Argument for the defendants. The principles laid down and cases adduced by the other side do not apply to devises of incorporeal hereditaments; more especially of such a nature as advowsons, which are a species of property *sui generis*, the incidents of which differ altogether from the incidents of other real property. Thus, where an advowson is mortgaged or goes to the assignee of a bankrupt, the mortgagee or assignee cannot present. *Mackenzie v. Robinson*, 3 Atk. 559,* 3 Cruise, 39, 40, 42. In the writ of right of advowsons, the thing is demanded by the name of advowson, and no technical words of inheritance are introduced. Registr. Brevium, 29 b; Fitzherb. 30. According to Johnson and Cowel, the meaning of advowson is *jus patronatus*; and *jus patronatus* is the right of presenting whenever a vacancy occurs, that is, *in perpetuum*. Anything short of an advowson is only a presentation. A devise of *hereditaments* will pass an advowson.† According to Coke,‡ who refers to Bracton and Fleta, advowson imports the whole interest. Here, too, is the term *perpetual* affixed, which can only mean an interest *in perpetuum*. *Robinson v. Robinson*, 1 Burr. 38; and, according to Littleton,§ a devise *habendum in perpetuum* will carry a fee. At all events, it was the devisor's intention to provide for his family, by the dispositions of his will; an intention which ought to prevail in the construction of it, and which cannot be satisfied, but by giving Richard a fee in the advowson.

Cur. adv. vult

* And see 1 Burn's Eccl. Law, 4th ed. p. 125.

† Dyer, 323.

‡ Co. Litt. 17 b, 119 a.

§ S. 586.

And now there being a difference of opinion on the Bench, the Judges delivered their opinions *seriatim*.

RICHARDSON, J. The question upon this record is, whether by the devise in the will of the testator, Richard Pearce, to his son Richard, of the perpetual advowson of Husbands Bosworth in Leicestershire, an estate in fee in the advowson, or only an estate for life, passed to Richard Pearce, the son. If the fee passed, then the defendants, as the devisees of Richard Pearce, the son, are entitled to the advowson; if an estate for life only passed, then the reversion of the advowson descended to Thomas Pearce, as the eldest son and heir of the testator; and consequently the plaintiffs, as claiming under Thomas Pearce, are now entitled.

I am of opinion that by this devise, an estate for life only in the advowson passed to Richard Pearce, the son.

The simple question is, whether the words "perpetual advowson" are descriptive of the thing devised, or of the testator's interest in that thing. I think that they are descriptive only of the thing devised.

It has been argued that the word advowson imports a perpetual right to present, and would alone pass a fee: and that it is used by the testator in this extended sense, is said to appear the more clearly in this case by the epithet "perpetual." The latter part of this argument appears to me, to be very much weakened by the former; for, if the word advowson in itself imports any perpetuity of right, then the addition of the epithet "perpetual," only expresses what would otherwise have been implied, and carries the sense no farther.

The fact, I think, is, that "advowson," or "perpetual advowson," import the same thing; both denoting a right to present, not confined to one, or to any definite number of presentations, but to be exercised as often as a vacancy occurs. Such I conceive to be the meaning of the term "advowson," or "perpetual advowson;" but this does not prevent that description of property, like every other description of lands, tenements, and hereditaments, from being carved out into an estate for term of years, for life, in tail or in fee; nor does it exempt it from the rule of construction common to all grants of real property, whether in deeds or in wills, namely, that by a grant of the thing without more, an estate for life will pass. The authority of Lord COKE in his comment on the first section of Littleton is express on this subject, where, Littleton having laid down the rule as applicable to lands, Lord COKE observes, that Littleton, in that and other places, putteth lands but as an example; for that his rule extendeth to signiorities, rents, advowsons commons, estovers, and other hereditaments, of what kind or nature soever. Co. Lit. 4.

The only difference in this respect between deeds and wills is, that, in the former, technical words are necessary to pass an estate of inheritance; in the latter, equivalent words, that is, any words importing such an intention will suffice. But equivalent words are as necessary to pass the inheritance in a will, as technical words are in a deed: and I find no such equivalent words in the will.

The testator here, after giving all his lands and estates in the county

of Hertford and Middlesex, to his daughter and her heirs, (using proper words to convey the inheritance when such was his intention) proceeds thus: "I do give to my son Richard, the perpetual advowson of Husbands Bosworth, in Leicestershire, and my manor of Stanwick, and all my lands in Northamptonshire."

It has been properly decided by the Court of Exchequer, that, by this devise, the lands passed only for life: and it would be extraordinary, if, by the same words of devise, applied in the same sentence to two sorts of property, the one should pass for life and the other in fee.

It has been said, that a devise of hereditaments will pass an advowson, which is true; but it is equally true that, by such a devise without more, an estate for life only will pass. This rule as applied to land, is settled by *Denn, dem. Moore, v. Mellor*; and applies equally to every description of real property, whether corporeal or incorporeal, whether capable of a constant enjoyment, like lands or houses, or only of an occasional one, like tithes or the patronage of churches or offices, which can only be exercised when an occasion or vacancy occurs. If a man, having lands, tithes, and advowsons in fee, should devise all his hereditaments to I. S. without more, it is clear that the land would pass for life only; and so also would the tithes and advowsons, though the devisee might die before any tithes should accrue, or any vacancy occur.

One other circumstance remains to be noticed; namely, that, at the time of making this will, the testator's son Richard, was actually the incumbent of the benefice; whence it is argued that, unless the fee passed, the devisee could derive no benefit from the devise, and thence an intention is inferred to give the fee. But this is not so; for although it is true, that the devisee could not have sold his interest in the advowson, and then have vacated the benefice by resignation in favour of the purchaser; yet he was empowered by this devise, with the consent of the ordinary, to vacate in favour of a child, a relation, or a friend, for whom he might wish to make provision, and it appears that he actually did so: or a vacancy might have arisen without resignation, by the incumbent's attaining to other ecclesiastical preferment. The devise, therefore, though only for life, had an operation by giving to the devisee a very different interest in the advowson from that which he had before, as the mere incumbent: and this is sufficient to satisfy the words of this devise.

For these reasons, I am of opinion, that judgment must be given for the plaintiffs.

BURROUGH, J. The question is, whether the deviser has by his will devised to his son Richard the perpetual advowson of Husbands Bosworth in fee or for life. [Here the learned Judge stated the devises in the will as set forth in the pleadings.] This will, as to the devise to the son Richard of the manor of Stanwick and all the deviser's lands in Northamptonshire, has been under the consideration of the Court of Exchequer. It appears that the Court was of opinion, that Richard took only an estate for life in the lands of Northamptonshire: the

Court thought that there were no auxiliary words in the will, either in the introductory part or elsewhere, to give the words of devise of all the devisor's lands in Northamptonshire any greater effect than a devise of an estate for life to Richard. It appeared to the Court not to be necessary to say in that case what interest Richard took in the advowson; but it is obvious that, if Richard took a fee in the advowson, it might have been urged with great force, that he took a fee by the devise of the lands immediately following. The Lord Chief Baron, however, said (1 Price, 353,) that the words "perpetual advowson" did not carry it further than "advowson:" any thing short of advowson, he said, is the next presentation. Strongly confirmatory of this is what is said by Mr. Justice BAYLEY, in *Doe Dem. Wood v. Wood*, 1 B. & A. 518. In that case the devise was to Henry Wood of "all the rest of the devisor's farms, lands, tenements, and buildings, and the perpetual advowson of Rusper rectory, to be kept in the family and name of the Woods as long as can be." The Court held, in that case, that the words "to be kept, &c." gave a fee, but Mr. Justice BAYLEY said, "the former part of the devise of all his farms, lands, tenements, and buildings, would not give more than an estate for life. Nor would the words "perpetual advowson" carry it any farther; for the word "perpetual" applies only to the description of the property, and not to the quantum of interest, which the devisee takes in it." Nothing is said to the contrary of this, either by Lord ELLENBOROUGH, Mr. Justice ABBOTT, or Mr. Justice HOLROYD.

This brings it to the dry question of, what is the effect of the words of devise of the perpetual advowson in this will? In support of the idea of its carrying a fee, it has been stated, that, in a writ of right of advowson, it is demanded in the writ by the name of "advowson." When the purpose of the writ and of the count in the writ are considered, it seems to me to prove the contrary. By the writ the defendant demands the thing as "manor," "messuage," "land," "advowson," &c., without adverting to the extent of his interest; the count on the writ of right invariably states a seisin in fee in the demandant, or some other under whom he derives his title in the thing sought to be recovered, after stating the writ which demands the thing in general; and as Co. Litt. 17 b. "of an advowson and such like he shall plead" what is in the count, "that he is seized *de advocacione ut de feodo et jure*." An advowson being an incorporeal hereditament, the demandant cannot say he was seized *de feodo et jure*; but he must say, *ut de feodo et jure*, a similitudinary expression. In 1 Gibson's Cod. 758, s. 5, it is said, that "an advowson, being an inheritance incorporeal, and not lying in manual occupation, cannot pass by livery, but may be granted by deed or by will, either for the inheritance, or for the right of one or more turns, or for as many as shall happen within a time limited." It has been often said of the author of this book, that he was a good common lawyer. I think it must be inferred, that he meant that a mere devise of an advowson would not pass the incorporeal inheritance in it. In 2 Blackst. Com. Book 2, ch. 3, 1, it is said, that an advowson is an incorporeal hereditament. So says Bishop Gibson in substance. Now a devise of devisor's hereditaments will pass an

advowson, Co. Litt. 6, a., where it is said, that "hereditament" is the largest word of all in that kind: for whatsoever may be inherited is an hereditament, be it corporeal or incorporeal, real or personal, or mixt.'

In *Doe dem. Small and Others v. Allen*, 8 T. R. 503, Lord KENYON says, "The next point arises on the word 'hereditaments;' and I am astonished that any doubt should have been entertained about that. It is not so strong a word as 'tenement;' it is merely a description of the thing itself, and not of the quality of it." His lordship was of the same opinion in *Doe dem. Palmer v. Richards*, 3 T. R. 356. What he says as to the doubt arose from what was said in that case by Mr. Justice ASHURST and Mr. Justice GROSE. Lord KENYON was fortified in his opinion by what was said by Lord Chief Justice TREVOR, in *Hopewell v. Ackland de Mosely*, Rep. 240, 1 Salk. 250. Thus then the word "hereditament" in a devise will pass an advowson, but it will not, without more, pass a fee; could it then pass a fee in an advowson, within which it is comprehended? No—why is this? because it is a description of the thing, and not of the quality of the thing; this accords entirely with what Mr. Justice BAYLEY says in *Doe dem. Wood v. Wood*.

It is a settled rule in the construction of wills, that there must either be words of limitation to pass a fee, or expressions having the same effect. Words denoting the entire interest in the thing devised, will pass a fee as well as the word estate, or a charge on the thing by which the devisee may be a loser, if a fee does not pass. This was the case (amongst many others) of *Doe dem. Palmer v. Richards*. There the words were of a devise of "all the rest, residue, and remainder of my messuages, lands, tenements, hereditaments, goods, chattels, and personal estate whatsoever, my legacies and funeral expenses being thereout paid."

The frame of this will does not require that a fee should pass. The circumstance that the devisee was a son and incumbent at the time, does not require it; for a benefit did pass, and he has, in fact, had an opportunity of receiving that benefit by presenting another on his own resignation.

It appears that in one part of the will, the devisor has used words of limitation in the devise to the daughter and her heirs.

The heir at law is not to be disinherited but by words of limitation, words tantamount, or necessary implication, to be collected from the whole of the will.

In this case, in my judgment, there is no ground for holding that Richard, the son, took more than an estate for life. I therefore think the judgment must be for the plaintiffs.

PARK, J. Though I have the misfortune to differ from my two learned Brothers, who have preceded, and I believe, also, from the Lord Chief Justice, who is to follow me in the argument; yet I shall not feel it necessary in stating the grounds of my opinion, to do so at any great length.

The words of the will of Richard Pearce, who died in the year 1800, have been so often stated, that I shall not think it my duty to re-

peat them, the only question being, whether the devise of the perpetual advowson of the church of Husbands Bosworth to his son Richard be a devise in fee or for life only.

In my view of this case, it is not necessary to discuss the exact meaning of the word "advowson," whether *ex vi termini*, it would, in a deed, carry the whole interest in fee; and whether if less than the whole is intended to be conveyed (as less than the whole clearly may be carved out by the person seized of the whole,) there should not be words of restriction, such as in tail, for life, for years, or the next, or the next two avoidances, indicative of that intention.

If one looked to the origin of advowsons, one would have supposed that this was so; because according to Lord COKE, Co. Litt. 119, c., "advowson is so called, because the right of presenting to the church was first gained by such as were founders, benefactors, or maintainers of the church." "They were, also, called *patroni*, and, thereupon, the advowson is called *jus patronatus*. And in one word, advowson of a church is the right of presentation or collation to the church."

The *jus patronatus*, according to the explanation here given, is the same as advowson; and surely, the *jus patronatus*, unless it has restrictive words, one should have supposed, as an unlettered person, embraced the whole, and could never mean the next avoidance: and in common parlance, I am sure it does so.

But, as I said before, it is not necessary for me to give an opinion upon the question what that word must be taken to mean in a deed, where no words of inheritance are added. I shall assume that Lord COKE is right when, in page 4, a. of the first Institute, he says, that advowsons are one of those things, which must have words of inheritance added to them, according to the first section of Littleton, to make them an estate in fee-simple. But he is here speaking only, and Littleton before him, is only speaking of the necessity of words of inheritance in his purchase as Littleton calls it, that is in *his deed*.

I am also willing to admit, as not affecting my view of the argument, that, if words of inheritance are omitted in a deed, the word "perpetual," prefixed to "advowson" will not carry it further; for that may not be its import in legal acceptance; and, in this respect, Lord Chief Baron THOMPSON must be understood, when he says any thing short of advowson is the next presentation, a phrase, however, which, by those who contend that the word advowson carries the whole, may be supposed to favour their interpretation. Mr. Justice BAYLEY, also, supposes the word "perpetual" to be descriptive of the property, and not to be applicable to the *quantum* of interest which the devisee takes in it; a proposition, however, to which, in its extent, and as used by a testator in disposing of his property, I cannot, with all due deference to my learned Brother, who is made by the reporter so to express himself, fully subscribe.

Having made these admissions on my part, it must now be admitted to me, on the other, that many words, which will not carry a fee in a deed, will carry it in a will, if the words used in the devise can be shown to be sufficient to indicate that intention in the testator.

In the case last referred to, of *Doe dem. Wood v. Wood*, the words "perpetual advowson" were held to carry a fee, such being clearly the intention of the testator. Let me not be supposed to quote this case, for the purpose of saying, that any words, to be found in this will of Mr. Pearce, are half so strong as the words used in the case of *Doe v. Wood*. I only quote it to show the principle, that, under circumstances, "advowson" in a will will pass the fee.

As little, I presume, can it be contended, (although this devise of the advowson is found in the same sentence with a devise of "all his lands in Northamptonshire," which latter part of the sentence has been held not to carry the fee in those lands,) that, therefore, this devise of the advowson cannot confer the absolute interest on the devisee. Lord Chief Baron THOMPSON has expressly declared the contrary in this very case; for his Lordship, in delivering the judgment of the Court, says, "even admitting that the words were sufficient for passing a fee, as to this part of the devise respecting the advowson, we are of opinion, that it would not necessarily follow therefrom that a fee also passed in the premises for which the present ejectment is brought."

His Lordship founded himself on the case of *Paice v. The Archbishop of Canterbury*, 14 Ves. 364, in which the Lord Chancellor said, "that where a man devised his farm and lands at Royston to Henry Taylor, his heirs and assigns for ever, and also I give and bequeath to the said Henry Taylor my farm and manor of Eythorne Court," the devisee only took an estate for life in the latter devise: although, in the same sentence, he took an estate in fee; and although the two bequests were united by the words "and also."

Then it seems to me, that we are to look at the whole of this case together on the face of the will, and on the facts admitted by the pleadings. The introductory words of the will show that the deviser meant to dispose of every thing, and that whatever he devised, he meant to give absolutely: "I, Richard Pearce, do give and dispose of *all my* worldly goods it has pleased God to bless me with, as follows." Now I admit that very strong introductory words have never been construed *by themselves* to carry a fee, and that the importance of the introductory clause, as manifesting an intention of complete and ultimate disposition, has been gradually declining in our courts: yet both Lord KENYON and Lord ELLENBOROUGH admit them to have some weight where the intention of the testator is doubtful, and where there are other words in the will to carry the intention into effect. Lord ELLENBOROUGH, in *Doe dem. Bates v. Clayton*, 8 East. 141, says, "This construction may be considered as in a degree aided by the introductory words of the will respecting his worldly and temporal estate, which are allowed to have *some* weight in cases where the intent of the testator is doubtful, and where there are other words in the will to carry his intent into effect." And Lord KENYON had said, that though such words would not of themselves have carried the fee, yet they will have *some* effect in the construction of the subsequent devises.

In *Doe, Lessee of Wall, v. Longlands*, 14 East. 370, Lord ELLENBOROUGH says, "Very little inference of intention can be drawn from

mere formal words of introduction; though we certainly find them in some cases called in aid to show that a man did not mean to die intestate as to any part of his property;" and his Lordship adds, what I admit weakens the force of his preceding observations, "and the making a will at all may also be used as affording such an inference."

However, I think no man can doubt, that Richard Pearce did not mean to die intestate, and that is all the benefit which I claim for my argument, from these words: Then he gives "to my son Richard, the perpetual advowson of Husbands Bosworth, in Leicestershire." Now, though in a deed I have admitted that "perpetual" prefixed will carry "advowson" no further than the word itself will do, yet, when the expression is used in a will made by a man ignorant of the law, (those words in common parlance being constantly used to express the absolute interest in the *jus patronatus*,) it surely may be considered, as showing the testator's intention to give every thing he had in this property, and that he contemplated *a perpetuity*, as if he had said, "meaning to dispose of all my worldly goods, I give the perpetual advowson, now belonging to me, to my son Richard, that is, all that I have in that advowson."

The words are, "the perpetual advowson;" that is, the advowson which is an entire or absolute advowson.

From the will it appears that he was providing for all his children much more than for their lives: but, except the South Sea annuities, if he gives only an estate for life in this advowson and manor of Stanwick, and all lands in Northamptonshire, (in which latter place it has been decided the devisee took only for life,) Richard the son would then have no provision beyond his life, as his other brothers and sisters have.

But the strong point of this case, as it strikes me, and what I can not answer satisfactorily to my own mind in any other way than by giving Richard the son this advowson in fee, is the fact stated in, and admitted by these pleadings. The will in question was made in the year 1795, devising this advowson, (as it is contended for life only,) to a man who had been in possession of it five years before, viz. in 1790, and was deriving every beneficial fruit from it, which he could enjoy; and which he must continue to derive, as long as he lived, unless he resigned it, or was promoted to some station incompatible with it, which latter cases are the only possible ones in which he could have even the power of benefiting a friend. I cannot conceive it possible that the father should devise to him that which he then, and for five years, had beneficially enjoyed, and which, but for his own voluntary act, he must continue to enjoy during his life; and, therefore, could never exercise his *jus patronatus*. I cannot conceive that the father could have intended to devise him nothing at all, or worse than nothing. Nor can I suppose the father to have acted upon the remote contingency of his son's preferment; remote to him it was, for (if it existed before this clergyman died,) it never existed in his father's life-time. The son was incumbent five years before the will, and the father lived five years after making it, till 1800, and yet never saw his son any thing but rec-

tor of Husbands Bosworth. But, even if he should vacate on promotion, the father gave him nothing but what I admit to be a great moral pleasure, that of advancing a friend; for he could not sell a turn or avoidance; which turn or avoidance, when he sold it, he knows he should himself immediately create.

But, if he resigned, it is said, he might present;—true, but then he would gain a loss; for then, to exercise his right of patronage, he must resign an income of 300*l.*, 400*l.*, or 500*l.*, a-year, or whatever the amount might be. If ill-health, or any cause of that nature, should oblige him to resign, I admit it to be a satisfaction to present a friend; but it would not then be a gift of pecuniary value. Whereas if it was an advowson in *fee* or *perpetual*, it was a provision for this gentleman and his family, by enabling him to carve out a provision for one of his sons, or, by selling the advowson, which he would then have a right to do; and thus, by giving him an inheritance, putting him on a footing with his brothers and sister.

Under these circumstances, I am of opinion Richard Pearce took this advowson in fee under his father's will; and consequently, that there ought, in my view of the case, to be judgment for the defendants.

DALLAS, C. J. I am of opinion that, by the words in this will, an estate for life only passes. It is admitted that in a deed this would be clear, nor is it contended, that the addition of "perpetual" would carry it further than the word "advowson" only. To this also the opinions given both in the Exchequer and in the King's Bench, directly go. What, then, is there in a will to justify a different construction, and to convert into a fee that which in a deed would be clearly but an estate for life? In general, the rule of construction must be the same, unless in the will itself there be found something to vary it. And this narrows the case to the consideration of the particular will, and to the effect of the words to be found in it, having reference to the subject-matter.

And, here, the argument must turn upon the rule applicable to all cases of this description, viz: the question of intention as to be collected from the whole will. Now, as to the question of intention, the leading rule laid down in the books is this, that, to carry the inheritance, the intention must be disclosed, either by express words or clear implication. A doubtful intent will not be sufficient to disinherit the heir at law. I am of opinion, that, in this case, a clear intent to pass an estate of inheritance does not appear; and, therefore, that, even if the intent were doubtful, such estate would not pass. One leading rule to be found in the books is, that the construction of wills shall be made according to the rules of the common law in respect to estates limited or created by deed, unless there be something clearly to be collected from the will itself, disclosing a different intention. And this is stated and frequently referred to as a safe and fundamental rule. In one of the reported cases, it is laid down in these terms: "The intent which ought to govern must be a certain and manifest intent, and not an arbitrary one; it must be according as it appears upon the will, and

according to the known rules of law; it is not to be left to a latitude, and as it may be guessed at."

This being premised, I come to the will in question. And, first, it is agreed, that no aid can be derived from the generality of the introductory words, for they would equally apply to lands, and the lands are devised generally, and in these it is admitted, that the devisee takes an estate for life only. It is also admitted, that no aid is to be derived from the probability of the testator not meaning to die intestate. Generally speaking, this would more or less apply to every case of partial intestacy; and, no doubt, in many of such cases, the probability is, that the effect given to the will is contrary to the intent of the testator. In the nature of things, a man is generally glad to give what he means to bestow by express words, and not (if I may so express it) sullenly to leave it to the silent operation of the law. If not in a majority of wills, yet, certainly in a great number, the construction is contrary to the probable intent. "Most people," said Lord MANSFIELD, "when they give their land, probably meant to give it absolutely, as they would give personal property, a horse, or a piece of plate." And to this observation, adopting it himself, Lord KENYON has more than once expressly referred. On what special grounds then does this case stand? A distinction was attempted at the bar, from the nature of the property itself. An advowson was said to be an incorporeal hereditament, differing from land; and certainly it does, in itself, differ from land; but it does not differ from land as to the rules of law, by which it is to pass in a will or in a deed. As to a deed, I have already said, it stands on the same footing, and this is agreed. Now, taken as an incorporeal hereditament, what is the effect? It operates as a description of the thing, not denoting the quantity of interest given, and, therefore, ranges under the general rule. In *Hopewell v. Ackland*, Lord TREVOR said, "the word 'hereditaments' cannot be taken to denote the measure or quantity of estate because it has a proper meaning and extends to annuities, advowsons in gross, &c., which are not comprised by the words lands and tenements." 1 Salk. 239. And in *Canning v. Canning*, Mosely, Rep. 242, it was said by the Master of the Rolls, that the law was settled in the case of *Hopewell v. Ackland*, that a fee will not pass by the word hereditament.

An advowson, therefore, as an incorporeal hereditament, will no more pass the fee by a devise of it as advowson in a will, than by a grant of it in a deed. "Advowson," or "perpetual advowson," apply, therefore, as descriptive of the thing devised, not as denoting the quantity of interest which the devisee is to take. And, whether it be in a deed or in a will, there is no difference whatever; the terms themselves alone being considered. The remaining part only is that which weighs with my brother PARK; and, without going in detail into this part of the subject, after what he has already said, but referring to the observations of my brothers PARK and RICHARDSON, I will only say that, even allowing this view of the subject to be entitled to weight, still it only involves, as it appears to me, matter of conjecture more or less doubtful; and, at all events, not denoting that clear and manifest intent,

which, on the known and admitted principles of law, can alone give to words in a will a different construction from what they would receive in a deed.

The rule, therefore, I think, must prevail, independently of other grounds, namely, that construction of wills shall be made according to estates at common law by deed, unless there be something in the intent of the will appearing to the contrary. Into this, therefore, the subject seems to me to resolve itself. And, even if I could admit it to be in a degree probable, that the testator might intend to give an estate in fee, I must apply the principle, so often applied in cases of this description, "*Voluit sed non dixit*;" and, not having said so, I cannot, on any conjecture, of my own, say so for him. I beg, however, to be considered as not forming any conjecture as to probability one way or the other, but as deciding the case, as far as my opinion goes, on the principle stated, and by which, I think, it ought to be governed.

Judgment for the plaintiffs.

COATES and Others v. PERRY and Others.—p. 48.

A conveyance by debtors to trustees, in trust to sell, and with the proceeds to discharge, first, debts due to the trustees, then debts due to other creditors, with a resulting trust for the original debtors, does not require an *ad valorem* stamp as upon a sale or mortgage under 55 Geo. 3, c. 184. By three judges (DALLAS, C. J., absente.)

At the trial of this cause, before PARK, J., at the last Hereford assizes, a deed of which the following is an abstract, was tendered in evidence, stamped with a common deed-stamp, and it was contended for the defendants, that it should have been stamped with an *ad valorem* stamp, under the 55 Geo. 3.* PARK, J., was of opinion that the deed was duly stamped, and the jury found a verdict for the plaintiffs.

By indenture, dated the 24th March, 1820, made between Ann Preece, widow, Edward, Thomas, Charles, and George Preece, of the one part, and Mark Poyntz Matthews, Benjamin Coates, and Thomas White, creditors and trustees named on behalf of themselves and other the creditors of the said Ann, Edward, Thomas, Charles, and George Preece, of the other part; after reciting that Ann, Edward, Thomas, and George Preece, were indebted to the said M. P. Matthews, the said B. Coates and the said T. White, respectively, in certain sums of money, making together the sum of 2220*l.* 11*s.* 8*d.*, and to various other persons, in several sums of money, and had agreed to assign all their personal estate and effects to the said M. P. Matthews, B. Coates, and T. White, in trust, to pay and satisfy the same in the manner thereafter expressed, in consideration of 10*s.* apiece, they the said A., E., T., and G. Preece, granted, bargained, sold, assigned, transferred, and set over unto the said M. P. M., B. C., and T. W., "All the live stock, and the crops of corn, grass, hay, straw, hops, and

* C. 184, Sched. part 1.

fruit, now growing or to grow; implements of husbandry; household goods, and furniture, plate, linen, and china; book and other debts, bonds, notes, bills, and securities; and all and singular other the personal estate, property, and effects of what nature or kind soever or wheresoever, of or belonging, or due or owing to them the said A., E., T., C., and G. Preece, or any or either of them," to hold to them the said M. P. M., B. C., and T. W., their executors, administrators, and assigns, wholly and absolutely, as and for their own proper goods, chattels, and effects; upon trust, that the said trustees should, without any further consent, authority, or concurrence of the said Preeces, or their executors or administrators, immediately upon the execution of the said deed, or at any time or times thereafter, when and as they should think fit, sell and dispose of, either by private contract or public auction, either together or in separate parcels, and at one time or different times, as they should think best, all and singular the said crops, goods, and effects, and get in and receive the debts and moneys, and other the personal estate and effects thereinbefore assigned, and should stand possessed of the money produced by such sale, and of the personal estate, upon trust, in the first place, to reimburse themselves respectively all expenses incurred in preparing and executing the said deed or relation thereto, and then in payment and satisfaction of all legal rents, taxes, and duties, and salaries and wages to clerks, servants, and agents, and also all expenses of the sale of the trust, and upon trust to pay and satisfy the said sum of 2220*l.* 11*s.* 8*d.*, with interest, after the rate of 5*l.* *per cent. per annum*, from the date thereof, and to pay and apply all the residue of the said moneys, in payment and satisfaction of the several other debts and demands owing by the said Preeces to such of his, her, or their respective creditors, or their respective executors, administrators, partners, or assigns, rateable and in proportion to the amount of the debts owing to them respectively, without any priority or preference of any one or more of them to the other or others of them; and after such payment, then, in trust, to pay the surplus to the said Preeces, to and for his and their own use and benefit. Power to the trustees, out of the first or any other moneys which might come to their hands, to satisfy any execution or extent against the person or property of the said Preeces. The deed also contained the usual power of attorney, to enable the trustees to get in the personalty, and a covenant on the part of the Preeces, to manage, work, and cultivate the lands, grounds, and premises in their possession or occupation, in the best manner, and sow and plant the same with proper corn, seeds, or grain, which might be deemed most advisable for the benefit of the creditors, for and upon the trusts expressed in the deed.

Lens, Serjt., having, on a former day, obtained a rule nisi to set aside the verdict, and enter a nonsuit on the grounds urged at the trial,

Vaughan, Serjt., who subsequently showed cause against the rule, argued that a stamp, as on a sale, could not be necessary, because the deed was not made upon an actual sale of the property, but only conveyed it to trustees, for the purposes of sale, and that a mortgage

stamp would be inapplicable; because, though the conveyance was for the payment of the trustees in the first instance, yet all the creditors were ultimately to obtain payment, so that the deed fell within the exception at the end of the clause, under the word "mortgage," in 55 Geo. 3, c. 184, Sched. part 1.

Lens, in support of the rule, urged, that the deed was substantially a transfer upon sale, and, therefore, ought to have an *ad valorem* stamp; or, if it was considered in the nature of a mortgage, that it did not fall within the exception in the statute, because it was for the benefit of the trustees, and not of the creditors generally, who would be left unpaid, if the estate upon sale did not produce sufficient to satisfy the trustees.

Cur. adv. vult.

And now,

PARK, J., delivered the judgment of the Court. This case came before the Court upon a motion to enter a nonsuit. The case was tried before me at the last assizes for the county of Hereford, and a verdict was found for the plaintiffs, with my approbation. One of the questions before me at the assizes was, and the only one now before the Court upon the motion is, whether the deed under which the plaintiffs claim the property, was duly stamped.

This case was argued the other day in the absence of the Lord Chief Justice; and my Brothers and myself postponed the giving our opinions at the time of the argument, not from any doubt we entertained, but because a question of the same nature in the same cause, the parties only being reversed, being depending in the Court of King's Bench, we wished to come to the same conclusion with that Court. I have not heard whether that cause has been before the Court; and, therefore, we can no longer delay our judgment.

This question depends on the 55 Geo. 3, c. 184, Sched. part 1, and it is admitted, that, if the deed is to be considered as a common deed, under the description in the schedule of the statute of "a deed of any kind whatever, not otherwise charged in this schedule, nor expressly exempted from all stamp duty,"* it has been duly stamped. But it is said, it must have an *ad valorem* stamp, for that this case is to be brought under the words in the schedule, "Conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation of any other kind or description whatsoever, upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or movable, or of any right, title, interest, or claim in, to, out of, or upon any lands, tenements, rents, annuities, or other property, that is to say, for and in respect of the principal or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers." But we are of opinion that the deed in question does not fall under this section of the act; for the words which I have emphatically mentioned, clearly show this clause to have been intended to operate upon actual sales between vendor and

* Sched. part 1, tit. Deed.

vendee. Now, the deed in question is no sale of the property to Coates and others, it is a deed, appointing them trustees to sell and to distribute the produce of the money in the manner therein mentioned; and the duty required to be paid in all the cases under this word *conveyance* in the statute, is, "when the purchase or consideration money therein or thereupon *expressed* shall amount to, &c.," evidently showing that what was meant by the legislature was an immediate money consideration *expressed*.* Now here, the consideration expressed is 10s.; but, then, it is argued to be a conveyance (under the word *mortgage* in the schedule) liable to an *ad valorem* duty, under these words, "any conveyance of any lands, estate, or property whatsoever, in trust, to be sold, or otherwise converted into money, which shall be intended only as a security, and shall be redeemable before the sale or other disposal thereof, either by express stipulation or otherwise;" and, if the clause had stopped where the words printed in *italics* begin, this deed would have fallen within that description: but the clause goes on, "*except where such conveyance shall be made for the benefit of creditors generally.*" If this deed was so made, then it falls within the exception, and the stamp imposed upon it was quite sufficient; we must look at the deed itself, for the purpose of ascertaining this. [Here the learned Judge read the trusts of the deed.] Now it is very true, that the primary object was the payment of the trustees, but there was also a trust, after they were satisfied, to pay all the other creditors, with a resulting trust for the original debtors. The payment of the creditors generally was therefore in contemplation at the time; that was the object; and we therefore think this case falls within the exception which I have last read.

To hold the contrary would be a very harsh construction, and would very much injure all insolvent estates, where deeds of this sort are deemed advisable, as they would have a double *ad valorem* duty to pay before any benefit could be derived to the creditors from the property; *one*, immediately upon the original conveyance from the debtor, and the other, as soon as the trustee sold, for the purpose of executing the trust, when there is no doubt, the *ad valorem* duty must be duly paid.

Every deed of this sort has its own peculiar properties, depending upon the arrangements made in each particular case. Here, undoubtedly, the first object was the payment of the debts of the trustees; but the general object was the payment of the creditors generally; and we are therefore of opinion this rule ought to be discharged.

Rule discharged.

* And see in Sched. part 1, tit. *Conveyance*, p. 514, of Ralphy's edit., the following "Note—The purchase or consideration money is to be truly *expressed* and set forth in words at length, in or upon every such principal or only deed, or instrument of conveyance."

(IN THE EXCHEQUER CHAMBER.)

BREThERTON and Others v. WOOD.—p. 54

In an action on the case in B. R. against ten defendants, as proprietors of a coach, for injuries sustained by the plaintiff, a passenger, in consequence of negligence in driving, whereby the coach was upset, the jury found a verdict against eight of the defendants, and in favour of the other two; and judgment was entered accordingly. On error in *cam. scacc.* the judgment was affirmed.

ABRAHAM WOOD, the plaintiff below in this cause, complained of Ister Bretherton, James Whittaker, Thomas Leary, William Jackson, John Dixon, William Lee, Mary Ribby, Ellen Bretherton, Abraham Dearden, and Elizabeth Dearden, (the defendants below,) being in the custody, &c., of a plea of trespass on the case: For that, whereas before and at the time of committing the grievances therein after next mentioned, the said defendants were proprietors of a certain stage-coach, for the carriage and conveyance of passengers for hire from Bury, in the county of Lancaster, to Bolton, in the same county, to wit, at, &c., and being such proprietors of the said stage-coach, the said defendants, to wit, on, &c., at, &c., received the said plaintiff, and the said plaintiff became and was an outside passenger upon their said stage-coach, to be safely and securely carried and conveyed thereon from Bury aforesaid to Bolton aforesaid, for certain hire and reward to the said defendants in that behalf, and, by reason thereof, the said defendants ought safely and securely to have conveyed, or caused to be conveyed, the said plaintiff on the said coach from Bury aforesaid to Bolton aforesaid; yet the said defendants, not regarding their duty in this behalf, conducted and behaved themselves so carelessly, negligently, and unskilfully in this behalf, that by and through the mere carelessness, negligence, unskilfulness, and default of themselves and their servants in that behalf, the said coach, afterwards, and whilst the same was carrying and conveying the said plaintiff as aforesaid, and before the arrival thereof at Bolton aforesaid, to wit, on, &c., was upset and overturned, to wit, at, &c., by means whereof the said plaintiff, then being thereupon, became and was greatly cut, &c., &c. Second count; and whereas also heretofore, to wit, on, &c., at, &c., the said defendants being then and there proprietors of a certain other stage-coach, the said defendants received the said plaintiff, and the said plaintiff, at the special instance and request of the said defendants, became and was an outside passenger by the said last-mentioned stage-coach, to be safely and securely carried and conveyed thereby from Bury aforesaid to Bolton aforesaid, to wit, at, &c., by reason whereof the said defendants ought safely and securely to have conveyed, or caused to be conveyed, the said plaintiff on their said last-mentioned coach from Bury aforesaid to Bolton aforesaid, yet the said defendants again, not regarding their duty in this behalf, conducted and behaved themselves so carelessly, negligently, and unskilfully in this behalf, that by and through the mere carelessness, negligence, unskilfulness, and default of themselves and their servants in that behalf, the said last-mentioned coach afterwards and whilst the

same was carrying and conveying the said plaintiff as such outside passenger as aforesaid, to wit, on, &c., was overset and overturned, to wit, at, &c., by means whereof the said plaintiff, then being thereupon, became and was greatly cut, &c., &c. Plea, not guilty, and issue thereon. At the trial at Lancaster, (Summer assizes, 1820.) the jury found on this issue, that two of the defendants below, Mary Ribby and Ellen Bretherton, were not guilty of the premises laid to their charge, and that the rest of the defendants below were guilty thereof, and assessed the damages at 50*l*. On this finding, judgment was entered up in the Michaelmas term following for the plaintiff below, against the defendants below, who were found guilty, and for the two defendants below, who were found not guilty.

The defendants below, who were found guilty, having brought a writ of error in this court, assigned for errors, "that although by the record aforesaid, it appears that the said Abraham Wood commenced and prosecuted his action in this behalf, and declared therein against all of them, the said Peter, James, Thomas, William Jackson, John, William Lee, Abraham Dearden, and Elizabeth, jointly with one Mary Ribby and one Ellen Bretherton: Nevertheless it appears, in and by the said record, that the verdict was given severally; that is to say, that the said Mary and Ellen were not guilty of the premises laid to their charge; and that the said Peter, James, Thomas, William Jackson, John, William Lee, Abraham Dearden, and Elizabeth, were guilty of the premises laid to their charge, in manner and form as the said Abraham Wood hath within thereof complained against them; and that it appears, in and by the said record, that judgment thereon was given for the said Abraham Wood against the said Peter, James, Thomas, William Jackson, John, William Lee, Abraham Dearden, and Elizabeth only, and not against the said Mary and Ellen; but that judgment thereon was given for the said Mary and Ellen, against the said Abraham Wood; whereas, by the law of the land, the judgment should have been given, either to the said Abraham Wood, against all of them, the said Peter, James, Thomas, William Jackson, John, William Lee, Mary, Ellen, Abraham Dearden, and Elizabeth, or for all of them the said Peter, James, Thomas, William Jackson, John, William Lee, Mary, Ellen, Abraham Dearden, and Elizabeth, against the said Abraham Wood, &c." Joinder in error.

The case was argued on a former day.

Littledale, for the plaintiffs in error. What appears on the pleadings in this case amounts, substantially, to the statement of a contract, and, if so, the action ought to be subject to all the accidents of an action on a contract. With the addition of a word or two, the present declaration would form a declaration in assumpsit; for the expression *in consideration*, is not necessary, where a consideration appears. The pleadings in *Coggs v. Bernard*, 2 *Ld. Raym.* 909, show the convertibility of assumpsit and case in circumstances like the present. The plea there was, *not guilty*, but it might, with equal propriety, have been *non assumpsit*. If this action, which clearly arises out of a contract, be permitted to be framed in tort, the defendants labour under the following inconveniences.

First, they cannot plead in abatement, and so bring before the Court all who are jointly liable; the consequence of which is, that in an action for contribution, the plaintiff must prove his whole case, the record in the present action not being evidence for him, as it would be if this action were conceived in assumpsit. Besides, it would be questionable, whether contribution could be recovered at all from a joint tort-feasor. *Merryweather v. Nizan*, 8 T. R. 186.

Secondly, if this action were brought against three, one of whom was not a joint proprietor, the other two could not call him as a witness, whereas if the action had been assumpsit, such third party could not have been joined.

Thirdly, if the case had been reversed, and the plaintiffs in error had sued the defendant in error for his fare, they must have sued in contract, and have been bound by all the incidents of an action in that shape, and it seems inconsistent that the rule should not be mutual. *Powell v. Layton*, 2 N. R. 365, *Weall v. King*, 12 East, 452, and *Green v. Greenbank*, 2 Marsh. 485, are direct authorities in favour of the plaintiffs in error, to say nothing of the earlier cases of *Boson v. Sandford*, Salk. 440, *Dale v. Hall*, 1 Wils. 281, and others; *Buddle v. Wilson*, 6 T. R. 369, points the same way. *Dickon v. Clifton*, 2 Wils. 319, and *Govett v. Radnidge*, 3 East, 62, are the only cases against them. But *Weall v. King* was decided subsequently to *Govett v. Radnidge*; and *Dickon v. Clifton* can scarcely be entitled to much weight, when the reporter has made the Court doubt whether trespass and trover could not be joined. *Mitchell v. Tarbutt*, 5 T. R. 649, is quite distinguishable from the other cases, because the circumstances were altogether independent of any contract, and *Max v. Roberts*, 12 East, 89, went off on a defect in the declaration.

Manning, for the defendant in error. The inconvenience with respect to contribution does not exist, because joint proprietors of coaches are partners, and losses sustained by any one of them, on the partnership account, however occasioned, would, as between themselves, be the subject of an action of account or assumpsit, founded upon the partnership relation. As to a party who is not partner being comprehended in the action, for the purpose of excluding his testimony, the Court will not intend that such a fraud will be attempted. With respect to the proprietors being obliged to sue in contract, and being subject to all the incidents of such a suit, it imposes no inconvenience on them, because they must necessarily know the various members of whom their firm consists, while the passenger, if compelled to sue in contract, may not be able to collect those names, except through the expense of a plea in abatement.

To come to the cases, there seems no reason for impugning the authority of *Dickon v. Clifton*, merely because the reporter has written trespass, meaning probably trespass on the case. Then *Coggs v. Bernard* makes an end of this argument, by showing that a consideration is not necessary, and that, therefore, supposing the practice had been in these cases to declare indifferently in tort or assumpsit, if either should be excluded, it must be assumpsit. For if the declaration in that case

had been considered as framed in assumpsit, it would have been bad, for want of showing a consideration. But wherever the gist of the action is misfeasance, though assumpsit may be resorted to, case is the more proper remedy. Keilway, 160 *a*. In *Boson v. Sandford*, the entry was *super se suscepit*. The declaration was, therefore, clearly in contract; and it appears, from the other reports of this case, that it was decided mainly upon this distinction.* *Mast v. Goodson*, 3 Wils. 348, is in favour of the defendant in error, and is an answer to the case of *Green v. Greenbank*. In *Compton v. Richards*, 1 Price, 27, the gist of the action was held to be tort, though arising out of a contract. It is assumed, on the other side, that a contract exists here; but that is not necessarily the case. If a place in a coach is vacant, a party may insist on being carried, but if he were overturned, he might not be able to sue in assumpsit. *Brown v. Dixon*, 1 T. R. 274, is in favour of the defendant in error, and recognises *Dickon v. Clifton*. *Mitchel v. Tarbutt*, it may be admitted, does not apply to the present case; nor is it in the least affected by *Dale v. Hall*. Then *Govett v. Radnidge* is in point, and that case has since been confirmed.† [RICHARDSON, J. I argued the case alluded to: the Court said, on dissecting the declaration, it appeared to be on the custom of the realm, and that nothing appeared from which a contract could be inferred.] *Weall v. King* was decided on a collateral point; it was not true that the plaintiff bargained with *both* the defendants, and therefore there was a variance between the contract proved and that declared on. In *Buddle v. Wilson* there was a preliminary point which occupied the attention of the Court; and in *Powell v. Layton*, *Dickon v. Clifton* was not adverted to.

Littledale, in reply, urged, that except *Govett v. Radnidge*, all the cases cited for the defendant in error, were cases of tort, in which there was no element of a contract.

Cur. adv. vult.

DALLAS, C. J., now delivered the judgment of the Court.

This comes before us by writ of error brought to reverse the judgment of the Court of the King's Bench.

The action is an action on the case against the plaintiffs in error.

The declaration stated, that, before and at the time of the grievances complained of, the plaintiffs in error were proprietors of a certain stage-coach for the conveyance of passengers for hire, from Bury, in the county of Lancaster, to Bolton, in the same county, and being so, that they received the defendant in error, (who was the plaintiff below,) and he became an outside passenger, to be safely conveyed thereon from Bury aforesaid to Bolton aforesaid, for hire and reward, to the said plaintiffs in error in that behalf, and that by reason thereof, the plaintiffs in error ought safely to have conveyed, or caused to be conveyed accordingly, the said defendant in error; it then alleges, that not regarding their duty in this behalf, they so conducted themselves, that, by and through the carelessness, negligence, unskilfulness, and default of themselves and their servants, the said coach was overset, by means

* 1 Shower, 104; 3 Mod. 320, 3; 3 Levins, 351.

† In the unpublished part of M. & S.

whereof the defendant in error was greatly bruised and wounded, and sustained other injuries.

To this declaration, the defendants below pleaded, that they were not guilty, and issue was thereupon joined. The record states, that the cause was tried at the last assizes at Lancaster, when the jury found that two of the defendants were not guilty, and that the other defendants were guilty, and assessed the damages of the plaintiffs below against them, besides the costs and charges, at 50*l*. On this verdict, the Court of King's Bench have given judgment for the plaintiff below, that he do recover damages and costs against the defendants below, who were so found guilty, and that the two for whom a verdict of not guilty was given, go without day.

The matter for our decision is, whether this judgment be erroneous. On the part of the plaintiffs in error, it was contended, that the statement of the case in the declaration amounts to a contract, and *that* being so, all the rules which relate to actions founded on contracts must govern, and that it is a rule of law that such actions are joint, and must be maintained against all the defendants named in the declaration, or fail altogether. If it were true, that the present action is founded on a contract, so that, to support it, a contract between the parties to it must have been proved, the objection would deserve consideration. But we are of opinion, that this action is not so founded, and that, on the trial, it could not have been necessary to show that there was any contract, and therefore that the objection fails.

This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.

It appears by the different books of entries, Brownlow Redivivus, 11, Clift. 38, 39, Mod. Ent. 145, Herne, 76, that this form of action is of very ancient use.

Nor is it material, whether redress might or might not have been had in an action of assumpsit; that must depend on circumstances of which this Court has no knowledge: but, whether an action of assumpsit might or might not have been maintained, still this action on the case may be maintained. The action of assumpsit, as applied to cases of this kind, is of modern use. The action on the case is as early as the existence of the custom or common law as to common carriers.

If the action be not founded on a contract, but on a breach of duty depending on the common law, on a tort or misfeasance, it cannot be contended, that the judgment is erroneous; for, from the nature of the case and the form of the action, it is several and not joint, and may be maintained against some only of those against whom it is brought.

In this view of the subject the authorities principally relied upon by the plaintiffs in error have no application.

The cases of *Powell v. Layton*, and *Max v. Roberts*, were decided

by the same judges : they are in no respect like the case now before us. Each of these cases is an action against owners of a ship, not stated to be a general ship carrying the goods of all who choose to send them ; but it is stated as a particular employment in each case. In the first of these cases, *Powell v. Layton*, the declaration is, that the plaintiff, at the special instance and request of the defendants, had caused goods to be delivered to them, to be carried, conveyed, &c. Now it is obvious, that this was a case founded on a particular contract ; therefore, said the Court, the defendant's plea in abatement, that the defendant, Layton, had a partner jointly interested, to whom the goods were delivered, as well as to him, the defendant, is good, and this person ought to have been joined.

In *Max v. Roberts*, which was before the same judges, the point in the cause was decided on the same principle, although the question arose in a different shape. There, the declaration stated, that the defendants were owners of a ship, and that the plaintiff delivered to them his goods to be carried, &c. On the trial, the plaintiff failed in proving, that the defendant, Roberts, and the eight other defendants, were part owners ; by his evidence he affected the eight only ; the same judges who decided *Powell v. Layton*, held, that the owners had no duty imposed on them, but what arose by contract ; and adhered to the decision in *Powell v. Layton*.

In the present case, a duty was imposed on the defendants which did not arise by the contract, but by the custom or common law of England.

It is not material, therefore, to contrast the decision in these cases, of *Powell v. Layton*, and *Max v. Roberts*, with the decision of the Court of King's Bench in the earlier case of *Govett v. Radnidge*, because this case differs from them. If these cases become opposed to each other, it must remain to be decided hereafter which of them is right, if they differ. At present it is sufficient to say, that this action is founded on a misfeasance, and that the declaration is framed accordingly ; and therefore, that the verdict and judgment given against some of the defendants is not erroneous, and ought to be affirmed.

Judgment affirmed.

(IN THE EXCHEQUER CHAMBER.)

DE TASTET v. RUCKER, and Others. (In Error.)—p. 65.

Error was assigned on a misnomer of one of the plaintiffs below in the warrant of attorney, and also on the omission of any entry of verdict and judgment upon an issue joined on a plea of set-off. The Court *held*, that there was nothing in the first objection, and gave leave to amend the transcript as to the second.

THE plaintiff assigned for error, first, the insufficiency of the declaration; secondly, that, by the record, it appears, that, in the warrant of attorney filed and remaining of record in the court below, to warrant George Tomlinson to be attorney for Martin Albert Rucker, John Ernest Frederick Westphalen, and John Christoph Frederick Rist, against Firmin de Tastet, in the plea aforesaid, the said John Christoph Frederick Rist is described by the name of John Christoph Rist, and not by the name of John Christoph Frederick Rist.

Thirdly, That by the record, it appears that there is no warrant of attorney filed or remaining of record in the said court of, &c., between the parties aforesaid, to warrant George Tomlinson to be attorney for the said M. A. R., J. E. F. W., and J. C. F. R., against the said F. de T.

Fourthly, That, by the record aforesaid, it appears, that in the warrant of attorney filed as remaining of record in the court below, between the parties aforesaid, to warrant James Lowe to be attorney for the said F. de T., at the suit of the said M. A. R., J. E. F. W., and J. C. F. R., in the plea aforesaid, the said J. C. F. R. is described by the name of J. C. R., and not by the name of J. C. F. R.

Fifthly, That, by the record aforesaid, it appears, that there is no warrant of attorney filed or remaining of record in the said court of, &c. between the parties aforesaid, to warrant the said Charles L., to be attorney for the said F. de T., at the suit of the said M. A. R., J. E. F. W., and J. C. F. R.

Sixthly, That, by the record aforesaid, it appears, that there were two issues joined between the said M. A. R., J. E. F. W., and J. C. F. R., and the said F. de T.; but that the jury, who were summoned to try those issues, found a verdict for the said M. A. R., J. E. F. W., and J. C. F. R. on one of those issues only, but did not find a verdict for the said M. A. R., J. E. F. W., and J. C. F. R., or for the said F. de T., on the other of the said issues.

At a former day in this term, *Pollock F.* had obtained leave to amend the transcript of the record, as to the last error assigned, and had subsequently amended the *nisi prius* record and judgment roll, by an application in the court below.

Littledale, for the plaintiff in error, now applied to have this rule to amend the transcript discharged *quia improvide emanavit*. The proper course would have been, first, to obtain a rule in K. B. to amend the *postea*; and, afterwards, the judgment: whereas the rule here was to amend the transcript, before any alteration in the judgment in K. B. This court has no power to make such a prospective order.

Finding the Court against him upon this point, he cited many cases from 1 Roll. Abr. 289, and 3 Viner Abr. 292, Com. Dig. tit. *Amendment*, in which judgments had been reversed for the first cause assigned. These were all antecedent to the statutes of jeofails, 32 H. 8, c. 30, 18 Eliz. c. 14, or did not appear to have been after verdict; but he contended, that though the want of a warrant of attorney was cured after verdict, yet, that here a warrant of attorney was certified, varying from the name of the party on the record; and that a bad warrant, like a bad original, remained as before the statutes. He also referred to several modern cases upon misnomer and variance,* not, however, distinctly applying to warrants of attorney. And he urged, that, as warrants of attorney may be filed at any time before final judgment, the defendant below had no opportunity of pleading in abatement, or of making any application to the Court on the ground of the variance.

Pollock, F., contra, contended, that this must be taken to be no warrant, as between these parties, in which case the omission was cured by the statutes, or it was a misnomer in some part of the record, but whether in the warrant of attorney or in the pleading, the Court had no means of judging.

The Court said there was nothing in the objection, and affirmed the judgment.†

* *Corbett v. Bates*, 3 T. R. 660. *Shadgett v. Clipson*, 8 East. 328. *Delaney v. Cannon*, 10 East. 328. *Dring v. Dickenson*, 11 East. 225.

† The Reporters are indebted to a gentleman at the bar for the note of this case.

END OF TRINITY TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
Michaelmas Term,
IN THE
Second Year of the Reign of GEORGE IV., 1821.

MEMORANDA.

IN consequence of the demise of the Queen in the last vacation, Henry Brougham, Esquire, and Thomas Denman, Esquire, of Lincoln's Inn, barristers at law, who had filled the offices of attorney and solicitor-general to her Majesty, in this term, resumed their seats without the bar.

In vacation after Michaelmas term, William Elias Taunton, Esquire, Christopher Puller, Esquire, Lancelot Shadwell, Esquire, William George Adam, Esquire, and Edward Burtenshaw Sugden, Esquire, all of Lincoln's Inn, barristers at law, were respectively appointed his Majesty's counsel, and took their seats within the bar accordingly.

Shortly after the end of this term, at his house in Russel Square, died Sir James Mansfield, Knt., formerly Lord Chief Justice of the Court of Common Pleas.

WILLIAMS v. SAWYER, Esq.—p. 70.

Held, that an agreement (dated October 27, 1819, and stamped with a 20s. stamp) between landlord and tenant, that the landlord should have immediate possession (except as was mentioned) of a farm, lands, and premises, which had been occupied by the tenant for a term, the landlord to take the stock, and the tenant to hold over half the house, half the stable, the barns, and an enclosed ground, and to have the joint use of the yard with the landlord or on-coming tenant, till the 25th January following, without rent, &c., was properly rejected in evidence, on the ground that it operated as a surrender of the term, and therefore required a deed stamp, under 55 Geo. 3, c. 184, Sched. part 1.

TRESPASS against the late sheriff of Berks, for taking the plaintiff's goods and farming stock. Plea, general issue. At the trial, before ABBOTT, C. J., at the last assizes for Abingdon, it appeared, that the defendant levied and sold the goods as the goods of John Palmer, under a fieri facias against him, shortly after the 25th January, 1820. The farm was let by the plaintiff to Palmer, in July, 1817, by a memorandum of agreement on unstamped paper, under which he held the farm, till October, 1819, when, the rent being considerably in arrear, he entered into an agreement with his landlord, dated 27th October, 1819, by which he agreed to give up to his landlord (the plaintiff) the immediate possession of the farm, lands, and premises, &c., (except as was mentioned.) In consideration whereof, his landlord agreed with him, to take the whole of his stock of hay (except one rick) at a valuation, and to make a compensation for the fallows, which the said landlord or his on-coming tenant should enter upon immediately; all taxes, highways, duties, and outgoings, in respect of the said farm, to be paid and performed by the tenant, up to the 10th of October preceding. The said tenant to have liberty to hold over and enjoy half the house, half the stable, and the barns; and to have the joint use of the yard with the landlord, or his coming-on tenant, and also the enclosed ground, called, &c., and the cow-pens therein, up to the 25th day of January ensuing, without paying any rent or taxes for or on account of the same. (Signed by the parties, and witnessed.)

This agreement was stamped with a 20s. stamp, when produced in evidence by the plaintiff. The counsel for the defendant objected to its admissibility, on the ground that it operated as a surrender of the term, and therefore required a deed stamp.* ABBOTT, C. J., directed a nonsuit on this ground, but gave the plaintiff leave to move. Accordingly,

Bosanquet, Serjt., now moved to set aside the nonsuit and have a new trial, on the ground that this was merely an agreement to surrender a part of the premises, and, therefore, possession of a part only being given, could not operate as a surrender of a whole term.

But the Court were unanimously of opinion, that the instrument operated as a surrender of the term, and

Bosanquet took nothing by his motion.

Rule refused.

* The amount of which is 1*l.* 15*s.*, by 55 Geo. 3, c. 184, Sched. part 1.

SEVERN and Others v. OLIVE and Others, Directors of the IMPERIAL Insurance Company.—p. 72.

SAME v. SLADE and Others, ditto.

SAME v. WILSON and Others, Directors of the PHŒNIX Insurance Company.

SAME v. SHUM and Others, ditto.

The expense of experiments necessarily made for the purpose of affording evidence on a point in dispute new to scientific men, is not allowed on taxation of costs.

Nor are scientific and professional witnesses allowed any compensation for loss of time, unless they be medical men.

Two actions against one insurance company, and two against another, on the same loss, were at issue in Hilary term, 1820: the second, third, and fourth were set down for trial, at the sittings after that term; but not the first, upon two of the pleas in which there were demurrers. The second cause was tried at those sittings, and a verdict was found for the plaintiff. A rule nisi for a new trial in this cause was obtained in Easter term; but suspended from time to time, till one of the other causes should also have been tried, and the result of certain proposed experiments touching the point in dispute be made known. At the sittings after Michaelmas term, 1820, the first, third, and fourth causes were set down for trial; and the third, which then stood first in the paper, was tried, on which a verdict was found for the plaintiff. *Held*, that the costs were rightly apportioned by the prothonotary, half to be paid by one company, and half by the other.

THE plaintiffs had insured a sugar-house, in four several policies, at the offices of which the defendants were directors, and, the sugar-house having been burnt down, brought four actions on these policies. The actions were all at issue in Hilary term, 1820; the second, third, and fourth were set down for trial at the sittings after that term, but not the first, upon two of the pleas in which there were demurrers. The second cause was tried at those sittings, and a verdict obtained for the plaintiff; a rule nisi for a new trial in this cause was obtained in Easter term, but suspended from time to time, till one of the other causes should also have been tried, and the result of certain proposed experiments affecting the point in dispute be made known. At the sittings after Michaelmas term, 1820, the first, third, and fourth causes were set down for trial, and stood in the following order; *Severn v. Wilson*; *Severn v. Shum*; *Severn v. Olive*; and *Severn v. Wilson* was tried.

The defence being that the plaintiff had, without the knowledge of the defendants, used, in the boiling of sugar, a newly invented process more dangerous than the old one; a great number of expensive experiments were made by both parties, to ascertain the effects of this process, which consisted in the employment of oil, heated to an extraordinary temperature, and many scientific and professional men of eminence, among others, a lecturer at the university of Glasgow, were called, to give their opinions as to the safety or danger of the process, and the result of the experiments. These opinions were contradictory. The jury found a verdict for the plaintiffs.

The prothonotary, in taxing costs, having allowed various sums for the money laid out in experiments, and for the time of the scientific

and professional men employed in making them, and called as witnesses, and having apportioned the costs, half to be paid by the Phoenix and half by the Imperial office.

Hullock, Serjt., for the defendant, Olive, on a former day, obtained a rule, calling on the plaintiffs to show cause why the prothonotary should not review his taxation, on the ground that these sums ought not to have been allowed; and that, as only three causes were set down for trial at the same sittings, the apportionment of the costs to the Imperial office ought to have been one-third instead of one-half.

Lens, *Vaughan*, and *Taddy*, Serjts., now showed cause against the rule, and urged, that expenses incurred in furnishing evidence on a matter of opinion (more especially in such a case as this, where virtually such matter was the point in issue) could not be distinguished in principle from expenses incurred in furnishing evidence on a matter of fact; expenses which were always allowed in costs; that the process of boiling sugar, by the application of heated oil, being a new discovery, it was impossible for the most scientific witnesses to speak on the subject, without having had recourse to actual experiment; so that the results of these experiments were a necessary part of the evidence adduced; that with regard to the allowance for the time of scientific and professional witnesses, though it was certain that witnesses in general were entitled to no compensation for loss of time, yet there was an exception in behalf of medical men and attorneys; within the spirit of which exception, professional men of science, at least, must be considered to fall, the real ground of exception being the lucrative application of scientific acquirement. Lastly, with regard to the apportionment, that the two offices having had the mutual benefit of the experiments, ought equally to share the expenses.

Hullock, Serjt., in support of the rule. There is no instance in which an allowance has been made for experiments, or for any expenses which have merely contributed to the groundwork of an opinion. Witnesses have no allowance for making a view; and in actions touching the working of mines, scientific men, brought from great distances, for the purpose of taking plans, and rendering themselves otherwise competent to pronounce an opinion, have no allowance for their preparatory expenses. As well might the defendants be charged for the expense of entering and maintaining a man at the university, in order to render him competent to decide in matters of science, as for these preparatory experiments. If the process was new, the plaintiffs ought to have known the effects of it before they ventured to use it; if they knew the effects, the experiments were superfluous. As to the allowance for time, it is difficult to say why physicians should have such an allowance, inasmuch as they cannot sue for fees. But at all events, the exception has extended no further. *Moore v. Adam*, 5 M. & S. 156, *Willis v. Peckham*, ante, vol. 1, 515.

The apportionment ought to depend on the state of the causes when they went down to trial; there were then only three on the list; and the Court cannot connect what passed at a subsequent, with what passed at a former, sitting.

The Court directed, that the prothonotary should review his taxation, on the ground that no allowance ought to be made for the expense of experiments, nor for the time of scientific witnesses, unless they were medical men, such as physicians or surgeons, and referred to the cases of *Moor v. Adams* and *Willis v. Pecham*, as conclusive, that compensation for loss of time could not, in this case, be allowed to others.

Rule absolute.

GILMAN v. ELTON.—p. 75.

Goods of the principal in the hands of his factor cannot be distrained by the landlord of the factor's premises for arrears of rent due to him from the factor.

TROVER for bombazeens. At the trial, before DALLAS, C. J., (adjourned sittings after Trinity term last,) a verdict was found for the plaintiff, damages 196*l.*, subject to the opinion of the Court, on the following case.

The plaintiff, who is a bombazeen manufacturer at Norwich, had been in the habit of sending parcels of goods for sale, upon commission, to Thomas Milne, (now deceased,) who was a factor and broker, and also traded on his own account. On the 16th February and 5th of March, 1819, the goods in question were sent, packed in bales, and marked I. G. (the plaintiff's initials) to Milne, to be by him, as factor of the plaintiff, sold for the account of the plaintiff, in the usual course of their business, and were received by Milne on the 10th March, at his ware-room and counting-house, which he rented of the defendant, in Walbrook, London, as a yearly tenant. On the 6th March, 1819, the plaintiff drew a bill of exchange of that date on Milne for 200*l.* on account, which bill Milne accepted, and returned to the plaintiff, who afterwards cashed the same with his bankers at Norwich, and the bill, after the death of Milne, was duly presented by the said bankers' agents in London for payment, at the late ware-room and counting-house of Milne, and returned not paid. On the 16th April, 1819, Milne died, the goods then remaining unsold in the ware-room. On the following day, the defendant distrained them for 93*l.*, his arrears of rent due from Milne for the ware-room and counting-house. On the 24th of the same month, a formal demand of the goods was made on behalf of the plaintiff upon the defendant, who thereupon refused to deliver them, alleging, as a reason for his refusal, that he detained them under the said distress.

The question for the opinion of the Court is, whether, under the circumstances above stated, the plaintiff is entitled to recover. If the Court should be of that opinion, the verdict is to stand, but if of a contrary opinion, a verdict is to be entered for the defendant.

Marshall, Serjt., for the plaintiff. This is a case of great importance, considering the extensive interests which will be affected by the

decision; but, as there is no case in point, it must be determined on principle; and, on principle, the plaintiff contends, that goods in the hands of a factor are not liable to distress for rent due from the factor. Generally speaking, the landlord is entitled to distrain for rent arrear, whatever chattels he finds on the land demised; but there are exceptions to this rule; and the case of a factor falls within an exception which has been clearly laid down in favour of trade and commerce. Thus, goods exposed to sale in a market are exempt from distress;* a horse in a smith's shop; cloth at a tailor's, &c.;† goods in the hands of a carrier, whether private or public; *Gisbourn v. Hurst*, Salk. 250; and the same principle is deducible from *Trassell v. Morris*, Noy, 19, and *Simpson v. Hartopp*, Willes, 512.‡ The exemption of goods in the hands of a factor is expressly stated in the argument, in *Francis v. Wyatt*, 3 Burr. 1508, and not denied by Blackstone, the opposite counsel, nor by the Court. If such goods were liable to seizure, the consequences to trade in general must be extensively pernicious. *Pater-son v. Tash*, Str. 1178, and *Newsom v. Thornton*, 6 East, 17, show, that the factor is only a servant, and cannot *pledge* the goods of his principal.

Lawes, Serjt., for the defendant. These goods were placed in the hands of Milne, rather as a security than as with a factor for sale, Milne having accepted a bill on account; but, supposing him to have been employed as a factor, the goods are not exempt from the defendant's distress, who, as landlord, is entitled to take all he finds,* unless particularly protected or exempted.† The exceptions in favour of trade are confined to cases where something is to be wrought on the thing deposited (as in the case of clothes left with a tailor to be made up, or with a fuller to be fulled); and cases where the publicity of the deposit enables the landlord at once to presume that the goods do not belong to his tenant; as goods placed in a fair to be sold, or horses put up at an inn. The tailor may be compelled to work on the cloth,‡ and the innkeeper to receive the guest; there is not, necessarily, any compact between them and their employers; their offices are necessary; but the business of a factor is neither public nor absolutely necessary; it is a matter of private compact. The landlord has no reason for suspecting that the goods which he sees at the factor's do not belong to his tenant; and the manufacturer, instead of depositing them there, might journey to London, and superintend the sale himself, or sell them where they were manufactured. The rights of the landlord have always been protected and favoured by the law. It would be most inconvenient to him, if the existing exceptions were extended to the case of factors. Such a decision would subject him to repeated frauds or repeated actions of trespass. The *dictum* in *Francis v. Wyatt*, having fallen only from counsel in the course of argument, is entitled to no weight as authority; and it is entirely omitted in Blackstone's

* 1 Roll. Ab. 668, pl. 11. Co. Lit. 47 a.

† Co. Lit. 47 a. 1 Roll. Ab. 668, pl. 12. Com. Dig. Distr. C.

‡ Cited in *Gorton v. Falkner*, 4 T. R. 668.

§ 3 Blackst. Comment. 7. Com. Dig. Distr. B. 1.

|| Co. Lit. 47 a.

¶ 22 Ed. 4, 49.

reports. The decision turned on the ground that there was a private compact, and is therefore in favour of the defendant. No case can be found in which goods in the hands of a factor have been held to be exempted; but cattle sent to agistment have been held liable. Com. Dig. Distr. B. 1, *Fowkes v. Joyce*, 2 Vent. 50.

Marshall, in reply, urged that the case of *Rede v. Burley*, Cro. Eliz. 596, proved, that the exemption was not limited by the publicity of the deposit, and *Gisbourn v. Hurst*, that it extended to other objects besides those which were to be wrought on in the hands of the bailee.

DALLAS, C. J. The general right of landlords to distrain is clearly protected in point of law; and I agree, that whatever is found upon the premises is *prima facie* taken as belonging to the tenant; the rule grows out of the relation of landlord and tenant, and out of the nature of the thing itself; for all such rules are of simple origin. But rules which are of simple origin, if very general, become in time, and from change of circumstances, inconvenient, and thence, subject to exceptions. Exceptions to this general right of distress arose at a very early period, and have ever since been recognised by the Courts. The question, therefore, is, whether the present case comes under the general rule, or falls within one of the exceptions; and it will be necessary, first to advert to what is the foundation of the landlord's general right to distrain; the right to distrain the goods of one man on the premises of another, not being of natural origin, but of artificial contrivance. ASHURST, J., in *Gorton v. Falkner*, 4 T. R. 568, lays it down thus: "The foundation of this principle is, that, as the landlord is supposed to give credit to a visible stock on the premises, he ought to have recourse to every thing which he finds there." And in another place, "The right of landlords to distrain the property of a third person, for rent due from their own tenants, is founded on reasons of public convenience, and calculated for the preventing of fraud:" Per Ashurst *arguendo*, Burr. 1500; (fraud by which the tenant would be enabled to protect his property, if such a rule did not exist;) "and the exceptions out of the general rule are all of them tending to the benefit of trade and commerce, and general advantage." The rule was evidently founded, not on natural, but artificial arrangements. It was a rule to prevent a particular species of inconvenience which would otherwise have arisen. But as it was found that this rule, when universally enforced, created another kind of inconvenience, extensive in its nature, exceptions were necessarily introduced. In like manner, therefore, and on the same principle of public convenience, a rule has been adopted in favour of trade and commerce; and, as the landlord is protected under the general right of distraining, so goods of a certain description, and in certain situations, are protected in favour of trade and commerce. The question is, whether this case duly considered, falls within the latter exception or the general right. The exception has been clearly laid down: "Goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of his trade or employ, are, for that time, under a legal protection, and privileged from distress for rent." *Gisbourn v. Hurst*, Salk. "Materials sent to a weaver, or cloth to a tailor to be made up, are privileged,

for the sake of trade and commerce, which could not be carried on, if such things, under these circumstances, could be distrained for rent due from the person in whose custody they are." Willes, 515. Blackstone, after enumerating similar objects, says, "these are protected and privileged for the benefit of trade," 3 Blackst. Com. 8, and the Court is bound to consider the rule of public convenience as applicable to trade and commerce. The facts of this case clearly show, that the goods were received in London by the factor in that particular character; and on the ground of public convenience, it has been asked, why could not the manufacturer sell the goods in the place where they were manufactured? Perhaps he could do so. But will it be gravely urged, that the commerce of London should be annihilated, and persons at a distance compelled to sell on the spot, or travel to London, for the purpose of saving their goods from a distress? Can this be consistent with public benefit or public convenience? It seems to me that all the decided cases are consistent with the public advantage, and that it would be at once detrimental to the public, and inconsistent with the cases, if we were to hold, that goods in the custody of a factor were liable to seizure in the manner contended for. The nature of the exception on the score of necessity or public convenience is laid down by Blackstone, in the argument in *Francis v. Wyatt*, 1 W. Bl. 484; "It is, where it would be quite impracticable or highly inconvenient to dispose of or manufacture the goods at home?" Would it not be inconvenient to dispose of manufactured goods at home? The public convenience runs through all the cases of exception, and on general principle and analogy, this question comes within the scope of those decisions. As to the case of *Francis v. Wyatt*, (when all the analogies are in favour of the exemption of goods in the hands of a factor, and there is no decided case at variance with such a position,) it seems to me important, that the assertion in argument, touching the exemption of such goods, was not controverted by the opposing counsel or by the Court itself. I am aware, that in cases like this, in exceptions turning on nice distinctions, it is dangerous to lay down a general rule more broadly than is required; and (though the case does not seem distinguishable from that of goods sent to a wharf, or market, which have been holden to fall within the exception, on grounds of public convenience,) I expressly confine my present decision to goods in the hands of a factor. Considering that such goods are exempt from distress on the general grounds before stated, I think the plaintiff, in the present case, is entitled to recover.

PARK, J. The circumstance that this is a case of novelty and importance will excuse me for saying a word, after the very luminous judgment of my Lord Chief Justice. The general rule as to a landlord's right to distrain is perfectly clear and well understood; but Lord COKE says there are five exceptions to this rule, which exceptions WILLES, C. J., recognizes in *Simpson v. Hartlop*, and states which of them are *sub modo*, and which absolute. Therefore, though the general rule be old, the exceptions are themselves as old.

The instances mentioned under the exception as to trade, in Lord COKE, are not put as limiting or comprehending the whole exception,

but merely by way of illustration. The principle of the exception is admirably put together by Lord Holt, in *Salkeld*, 250, and his language shows that the exception was not established for the benefit of the individual, but of trade in general; he extends it to goods to be carried, wrought or managed; and are not goods placed in the hands of a factor to be managed?—this case falls strictly within his definition. The case in *Cro. Eliz. Rede v. Burley*, is also strong to show that it is the trade which is favoured, not the individual. But it has been asked, why the manufacturer does not himself travel to London? It would be impossible for him to do so, consistently with his interests; and the trade of a factor is as well known as any that is carried on. The case of cattle at agistment may be laid out of consideration; and the question is, whether this does not come within the exception in favour of trade and commerce; I think that it does.

BURROUGH, J. This case is to be decided on principle, and on the principle of all the decisions. From the earliest times, these exceptions to the general right of the landlord to distrain, have existed; the question therefore is, whether this case falls within the principle of the exception in favour of trade. In none of the cases has that principle been put, as if in favour of any particular trade, but for the advantage of trade in general. No one can read the case of *Francis v. Wyatt*, in Burrow, without seeing that the case of a factor falls within the principles there laid down; and it is not surprising, that positions contained in the report in Burrow, should not appear in the report of the same case in Blackstone, because it is well known that Blackstone's reports were published from his manuscripts after his death. The trade of a factor has indeed increased since the time at which that case was argued; but commerce in general, and the business of London and the country, could not be carried on without it. The trade of a factor is as well known as any other.

RICHARDSON, J. The right of the landlord to distrain is general; but there are several exceptions to this right, independently of modifications by statute, which do not affect the present question. At common law, there has always been this exception, (which applies to the present case,) that goods put into the hands of a trader, to be wrought, manufactured, or managed, are protected and privileged from distress. It has been contended, that this is only the case where they are to undergo some alteration in the hands of the trader; but it is not necessarily so, for a carrier does not operate upon goods, except to carry them; and the very words of the decision in *Gisbourn v. Hurst*, include carrying or managing. The advancement of trade equally requires that goods should be placed in the hands of a factor for sale, as that they should be placed in the hands of a carrier for carriage. It may be said, indeed, that the manufacturer might carry his own goods; but such an argument does not show any great regard for trade. Surely it is conducive to trade that goods should be sent from the place where they are wrought to the market where they are sold. Foreign goods must be so sent, when the wants of the importing country require it: but, it would be highly injurious to trade, if goods so sent for

sale were liable to be distrained for the private debt of the factor. The instances enumerated by Lord COKE, under the exception in favour of trade, are only put by way of example; and the present case falls clearly within the principle of the exception.

Judgment for the plaintiff

DOE, on the Demise of PENWARDEN, v. JOHN GILBERT
and Another.—p. 85.

Devise. "As for my temporal estates and effects, I give and dispose of the same in manner following: I give and bequeath to L. C. 4*l.*; I give and bequeath to M. H. 3*l.*; I give, devise, and bequeath to J. G., all my lands, tenements, and hereditaments, with their appurtenances, particularly those called B. and C.; and all the rest and residue of my goods and chattels, personal and testamentary effects whatsoever, I give and bequeath to the said J. G., whom I make sole executor of this my will:" *Held*, that J. G. took a fee in the lands of B. and C.

THIS was an action of ejectment, brought by Azarius Penwarden, as heir at law of Agnes Hatherly, to recover the possession of two tenements, called Bromehills and Blackhills, in the parish of Pancraswicke, in the county of Devon, in the possession of the defendants. At the trial before HOLROYD, J., at Exeter, at the last Lent assizes, a verdict was taken for the plaintiff, subject to the opinion of this Court, upon the following will, which was duly executed, to pass real estates:

"I, Agnes Hatherly, do make this my last will and testament, in manner and form following: First, I resign my soul to God, &c., and as for my temporal estates and effects, I give and dispose of the same in manner and form following; that is to say, I give and bequeath unto Lydia Casely, the sum of 4*l.*; also, I give and bequeath unto Mary Hatherly, of the parish of Bridgerule, widow, 3*l.*; which, with the last legacy, I order and direct to be paid by my executor after my decease. Also, I give, devise, and bequeath unto John Gilbert, of Pancraswicke aforesaid, all my lands, tenements, and hereditaments, with their and every of their appurtenances, and particularly those called and commonly known by the name of Bromehills and Blackhills, situate, lying, and being in Pancraswicke aforesaid, and which were lately the lands of my deceased husband, William Hatherly; and all the rest and residue of my goods and chattels, personal and testamentary estate and effects whatsoever, I give and bequeath unto the said John Gilbert, whom I make whole and sole executor of this my last will and testament. In witness, &c."

In case a life-interest only passed to John Gilbert, by the above will, then the verdict for the plaintiff, taken at the assizes, was to stand; but if the fee passed under that will, then it was admitted that the defendants were in the lawful possession of the property, and a verdict was to be entered for them.

Bosanquet, Serjt., for the plaintiff. The defendant took only an estate for life. From the language of this will it may be inferred, that the testatrix knew the import of technical terms: *give and bequeath* are applied to the legacies at the beginning of the will, and to the bequest of personalty at the end; and *devise* is applied to the lands; so that latitude of construction is here less allowable than in cases where the testator was ignorant. The introductory clause shows an intention to leave no property undisposed of; but a mere demonstration of intention in an introductory clause will not convey an estate, unless the intention be afterwards carried into effect by apt words. *Doe dem. Spearing v. Buckner*, 6 T. R. 612. No words of inheritance are attached to the devise of lands in the body of the will; and though the words *all my effects* (which, when accompanied with certain expressions pointing to the realty, have been holden to carry a fee), *Hogan v. Jackson*, Cowp. 299, are found in the residuary clause, those words, when alone, mean personal effects. *Camfield v. Gilbert*, 3 East, 521. Here, *a fortiori*, being accompanied by the word *testamentary*, and preceded by the word *bequeath*, which the testatrix knew how to employ scientifically, they can only comprehend chattels; for testamentary effects given to the executor, in the same sentence in which the executor is appointed, are such effects as would pass by testament, and would pass to an executor. These are only chattels, since, strictly speaking, a testament is applied to the bequest of chattels; a will to the devise of lands.* At all events, the expression *all my effects* in a residuary clause, has only been holden to carry a fee in property, of which there has been no previous disposition in the same will. Here the lands are expressly given in terms which convey an estate for life; and it is a rule, that an estate which is given in express terms shall not be enlarged by implication, unless the implication be essential to advance an intention expressed in the will. But, in this case, it must be presumed, that the testatrix gave, by the express clause, all the interest which she intended to pass in the land. It is not reasonable to suppose that she intended to give that by the residuary clause which she had already given by express terms in a former clause. In *Smith v. Coffin*, 2 H. Bl. 444 (where lands were held to pass under the words *testamentary estate* in the residuary clause, coupled with some general expressions in the introductory part of the will), there was no *previous* disposition of the lands. In that case, too, the heir at law was provided for by the testator, and the residuary estate charged with the payment of debts; all which circumstances distinguish it from the present. But that case was never cordially adopted nor acted on in decision, it carries the doctrine too far, and is not adverted to in other books, and *Doe dem. Spearing v. Buckner* proves, that the words, *all the rest, residue, and remainder of my estate and effects, of what nature or kind soever and wheresoever*, do not of necessity carry the real property, even when a strong intention is expressed in the introductory clause: to the same effect is *Shaw v. Bull*, 12 Mod. 593, and *Timewell v. Perkins*, 2 Atk. 102.

* Godolph. 4, s. 5.

Taddy, Serjt., for the defendant. The defendant took a fee. The intention of the testatrix to leave none of her property undisposed of is quite manifest, from the whole will taken together; and she has used words sufficient to carry that intention into effect. The expression in the residuary clause being "personal *and* testamentary effects;" the word *testamentary* is tautologous if it does not carry the fee; but the Court is bound to give, if possible, an effect to every word; and *testament* does not apply exclusively to bequests of chattels, for the statute of wills employs it as applicable to devises of land. As executor also, the defendant must take a fee, because he is required to pay the legacies in three months, and a fee might be necessary to enable him to do this. *Denn dem. Mellor v. Moor*, 1 B. & P. 562. *Smith v. Coffin* is precisely in point for the defendant; and the circumstance of there being here a previous disposition of the particular estate will not make any difference; the words *remainder* and *residue* having been holden to carry a fee, where an estate for life had passed in a preceding part of the will. *Hogan v. Jackson*. In *Timewell v. Perkins*, *Doe v. Buckner*, and *Shaw v. Bull*, the circumstances were not the same as in the present case.

Bosanquet, in reply. The expression *rest and residue* is not coupled here with effects real, as the words *remainder* and *residue* were in *Hogan v. Jackson*, but with *personal effects*. The payment of legacies is never a charge on the land, unless land is mentioned for the purpose.

DALLAS, C. J. Every case of this sort depends on its own peculiar circumstances; for, in every case, the question is one of construction to be made on the whole of the will; every case, therefore, is individual, and to be looked at with much caution; and the necessity for caution is the greater, when we consider, as HEATH, J., says, in *Smith v. Coffin*, that "Wills are frequently made in *extremis*; sometimes when the agonies of death are approaching; and it would be unfair to construe strictly the words used by an ignorant testator in that situation." The authority referred to in the present instance is *Smith v. Coffin*, where it is truly observed by BULLER, J., "Cases of this sort depend on niceties of expression, and sometimes even on a single word; and it has been frequently said, the nonsense of one man cannot be a guide for that of another;" and I, for one, should be very sorry to decide one case of this kind by another of the same kind, unless, on comparison, the two were found precisely alike. As to the case of *Smith v. Coffin* itself, if there were any doubt respecting it, it might require more consideration. That it is a single case, and carrying the doctrine far, (not meaning to say unsupported by principle,) that it is not adverted to in other books, comes to me for the first time. The testator meant to dispose of his whole property, and such in general is the intention of testators; but that is not sufficient, unless the will contains words to carry the fee. Here, under the clause containing the devise of the real property, if that clause be taken alone, an estate for life only passes but the question is, whether it can be connected with the intention to dispose of the whole, expressed in the introductory clause, and with the general words *all my testamentary estate and effects* in the re-

siduary clause, so as to pass the fee. There are many cases in which the words *estate and effects* will give a fee, from the company in which they are found. So that, considering the case of *Smith v. Coffin*, and that the word *testamentary* is here accompanied by nearly the same expressions as it was in that case, it appears clear, that the testatrix, in the present instance, has, by the introductory words, expressed an intention to dispose of all her property, and in the residuary clause, used expressions sufficient to carry that intention into effect. Indeed, HEATH, J., in *Smith v. Coffin*, thinks the residuary clause would not have been sufficient without the word *testamentary*. I am unable to distinguish this case from that of *Smith v. Coffin*, and, therefore, without going more at large into the question, I think, on the authority of that case, the defendant, Gilbert, takes a fee in the land devised to him by Agnes Hatherly.

PARK, J. There can be no question that the testatrix intended to dispose of the whole of her property. The rule is clear, that though introductory words will not convey an estate, yet they are of great use to aid the construction, if sufficient words of conveyance appear afterwards. Here it is admitted, that the fee of the property at Bromehills did not pass under the clause by which that property is devised; we must therefore refer to the residuary clause, and that is not distinguishable from the clause in *Smith v. Coffin*. HEATH, J., says there, "The residuary clause is sufficient to pass the estate in question; for the word *testamentary* is a most comprehensive term, and we should interpret it in much too narrow a sense if we were to confine it to personal property." A more liberal construction than was formerly admitted has obtained in these cases of late years; as, in devises of lands with an imperfect local description. Lord HARDWICKE, in *Tilley v. Simpson*, cited in *Fletcher v. Smiton*, 2 T. R. 659, takes this distinction as to the use of the word *estate*—that where it has appeared to be the intention of the testator that it should be so understood, the Court has restrained the word *estate* to carry personal estate only; but when he has used words comprehending all his personal estate, and then makes use of the word *estate*, that it will carry a real estate. In *Timewell v. Perkins* he says, "The word *estate* itself may include as well real as personal," where it is not confined by the testator to things personal. Here, the testatrix gives all her personal, and then her *testamentary estate*.

Under these circumstances, and particularly with reference to *Smith v. Coffin*, I think there must be judgment for the defendants.

BURROUGH, J. In questions concerning the intentions of a testator, I profess to decide on the will itself, and not on cases cited. Introductory words are of great importance to show the intention of a testator. If we inquire in what sense the present testatrix used the words *temporal estate and effects*, there can be no doubt that she applied them as well to land as to chattels. No doubt, she meant to give a fee by those very words: but it is immaterial to decide that, because the residuary clause coming after such expressions must be sufficient; and I have no doubt the testatrix applied the expression, her *testamentary estate and effects*, to the same objects as the expression, her *temporal estate and effects*.

RICHARDSON, J. I think that a fee passed by the residuary clause; unless it did, the latter part of it must be inoperative. This is the safest construction; especially when what the testatrix meant on the whole will is so apparent. The argument that the word testamentary is applicable to chattels only, is answered by reference to the statute of wills. But this very testatrix uses the word testamentary in the disposition of land.

Judgment for the defendants

HOOKHAM v. CHAMBERS.—p. 92.

Where a *feme covert*, separated from her husband by a sentence of divorce, a *mensa et thoro* was holden to bail while an appeal was still pending against the sentence, the Court, on motion, ordered the bail-bond to be cancelled, the *feme* filing a common appearance.

Hullock, Serjt., had obtained a rule, calling on the plaintiff to show cause why the bail bond in this case should not be delivered up to be cancelled, and the defendant be permitted to file a common appearance, on the ground that the defendant was a *feme covert* when the cause of action arose. The affidavit admitted that she had been divorced a *mensa et thoro*, but added, that she had appealed against the sentence of the ecclesiastical court, and that the appeal was still pending.

Peake, Serjt., who now showed cause, referred to the early pleas of coverture, to which it has been usual to reply, divorce a *mensa et thoro*, (Com. Dig. Abatement, E. 6 F. 2, H. 42,) and to *Stephens v. Tot*, Moore, 665, where the Court held, that a wife divorced a *mensa et thoro* might sue alone. After citing *Belknap's case*, 2 H. 4, 7 a, and *Sparrow v. Carruthers*, 2 Bl. 1197,* *De Gaillon v. Laigle*, 1 B. & P. 357, *Walford v. De Pienne*, 2 Esp. 554, *Hopewell v. De Pinna*, 2 Campb. 113, he said, the principle deducible from all the cases was, that where a wife was separated from her husband by competent authority, so that he would not be liable to her debts, the wife herself might be said to be a *feme sole*: here the husband could not be sued, being obliged, as a consequence of the divorce, to allow his wife alimony.

Sed Per Curiam. All the cases cited, except one *nisi prius* case, are anterior to *Marshall v. Rutton*, 8 T. R. 545, since which it has always been holden, that a *feme covert* cannot be sued, as a *feme sole*. Besides, here is an appeal pending against the divorce.

Rule absolute.

* Cited in *Ringstead v. Langborough*, 1 Co. B. L. 33.

PARK v. TORRE.—p. 93.

A writ of *habeas corpus*, returnable the last day but one of the term, having issued for the purpose of charging in execution a prisoner in the custody of the warden of the Fleet, the warden omitted to produce him at the return of the writ or afterwards. On a motion for an attachment against the warden, it appearing that the prisoner had the privilege of the rules; that search had in vain been made for him on the day of the return of the *habeas corpus*; that he was not found till it was too late to conduct him before the Court on the next day, when he was deprived of the rules, and returned to close custody; that before the application for an attachment, he had been discharged, under the insolvent debtors' act, from the action in which it was proposed to charge him in execution by the *habeas corpus*.

The Court discharged the rule for an attachment, on the warden's paying all costs.

Vaughan, Serjt., on a former day had obtained a rule *nisi* for an attachment against the warden of the Fleet, on an affidavit, which alleged that the defendant having been arrested at the suit of the plaintiff, was afterwards committed, upon a *habeas corpus*, to the custody of the warden; that the final judgment having been obtained in this action, a *habeas corpus* had been sued out by the plaintiff, under the seal of the Court, directed to the warden of the Fleet, returnable on Tuesday next after three weeks of the Holy Trinity, in Trinity term last, to satisfy the plaintiff; that on the 6th July last, the writ was delivered to the warden or his deputy, at his office in the Fleet prison, and that the warden or his deputy acknowledged the defendant to be in his custody, and received a fee for returning the writ; that the record of the judgment was brought into court, and that the clerk to the plaintiff's attorney attended at the return of the writ, (on the 10th July,) for the purpose of charging the defendant in execution, at the suit of the plaintiff, upon that judgment, and that he then paid the tipstaff the fees for bringing up the defendant; that the warden did not bring the defendant before the Court, but requested to be allowed until the following day for that purpose, and that the plaintiff's attorney and his clerk attended in Court until its rising on the following day, but that the warden did not bring the defendant into Court, and by such default the defendant could not be charged in execution on the said judgment; that the warden had since informed the plaintiff's attorney that he had granted the defendant the rules of the prison, and had taken security for his duly keeping the same, and had been prevented obeying the writ, by reason of his officers not being able to find the defendant within the rules, or elsewhere, from the time he received the same, until after the rising of the Court on the last day of last Trinity term; and that the warden had been personally served with the notice of the rule.

An affidavit in answer having admitted the receipt of the writ, stated, that, in consequence thereof, one of the turnkeys of the prison was repeatedly sent to the lodgings of the prisoner, (the defendant,) to desire his attendance for the purpose of explaining to him the nature of the suit, and the necessity of his attendance at the prison on the day of the return, in order that he might be before the Court, in obedience thereto; but that, notwithstanding every possible exertion, the defendant could not be found till late in the afternoon of the last day of last

Trinity term, when it was too late to conduct him before the Court; that the defendant, having deprived the warden of the power of complying with the command of the writ, was deprived of the benefit of the rules, and confined within the walls of the prison, where he continued a prisoner, at the suit of the plaintiff, until he was from thence discharged, by virtue of an order of the Court for relief of insolvent debtors, as well from the action in question, as from all other debts for which he was detained in custody;

Blossett, Serjt., now showed cause against the rule, and contended, that, though strictly speaking, the warden might be liable to the attachment, on the ground of a little remissness, (it not appearing that the utmost search had been made on the day when Torre was missing,) yet that the Court would not compel him to pay the debt, Torre having returned to prison before any farther proceedings were had, and the plaintiff having sustained no injury from the want of a due return to the *habeas corpus*, inasmuch as Torre was shortly afterwards discharged under the insolvent act. The privilege of the rules was acknowledged and authorized by the Court, and an action of escape or attachment for not bringing in the body would not lie against the sheriff, in circumstances similar to the present; to sustain such an action, the prisoner must have been seen out of the rules, and the action must have been commenced or the attachment sued out before he surrendered (*Tidd*, 299, 302, 6th ed.) *The King v. The Sheriff of Middlesex*, 2 M. & S. 562.

Vaughan, Serjt., in support of his motion, argued, that a prisoner in the rules was as much in the custody of the warden as if within the walls of the Fleet; and that the warden could suffer no injury from such a regulation, as he took ample security for the indulgence, and derived a considerable annual sum from the allowance of it. The reason why the action and attachment would not lie in the cases supposed as to the sheriff, was, because the plaintiff had the prisoner's body at the time of suing out his writ; but he had not the body at the time of the return of the *habeas corpus*, which, in this instance, was the only time to which the Court would look. The warden was bound to obey the writ, and the consequences would be serious if such an answer as was now given should be deemed sufficient.

DALLAS, C. J. The warden is undoubtedly bound to obey the writ, or to give a reason for not doing so; and the first question is, whether the reason here given is sufficient; strictly speaking it is not. The only answer is an affidavit, in which the officer informs the Court that one of the turnkeys was repeatedly sent to the lodgings of the prisoner, to desire his attendance for the purpose of explaining to him the nature of the writ. The turnkey makes no affidavit, to show what degree of diligence he has used to find the prisoner; if he could not find him at first, he ought to have increased his diligence; this is a very loose way of obeying the writ, which must be more carefully attended to in future.

Then, as to the consequences, the question is, whether the rule shall be made absolute, and on what terms. With respect to the plaintiff, as the prisoner took the benefit of the insolvent act, it would have

been no advantage had he been returned under the writ: are we then to put the plaintiff in a better condition than he would have been in case a proper return had been made to the writ? certainly not. But the warden must pay the costs, on the grounds which I have before stated.

Rule discharged, the warden paying all costs attending the application.

HUDSON and Another v. HARRISON.—p. 97.

Insurance on a cargo of wine, to be discharged partly at B., partly at D., and partly at L.

The vessel which conveyed the cargo being wrecked near B., and three-fourths of the cargo being either lost or so impregnated with salt water as to render it imprudent to delay the sale till the ports of D. or L. could be reached, the assured, on the 23d December, the day they heard of the loss, gave notice of abandonment; and, on the 27th of December, called a meeting of underwriters, which three underwriters attended, and ordered the assured to do the best for all parties. On the 28th of the ensuing February, and not before, some of the underwriters interfered, forbidding a sale of the damaged wines about to take place at B., and rejecting the abandonment:

Held, that this was a total loss, and entitled the assured to abandon; and that at all events, the underwriters, not having stirred for more than two months after notice of the abandonment, must be taken to have acquiesced in it.

An insurer, who rejects an abandonment, must do so within a reasonable time.

THIS was an action of assumpsit brought by the plaintiffs, to recover 300*l.* from the defendant, being the amount of his subscription to a policy of insurance for 7000*l.* on goods, effected in the name of the plaintiffs, on goods in the ship *Swallow*, on a voyage “at and from the Cape of Good Hope to Bristol, Liverpool, and Dublin, all or either, including the risk of craft, at the premium of two and one half guineas per cent., to return 10*s.* per cent. for such part of the interest as might be discharged at her first port.” By a memorandum in the policy, the insurance was declared to be “on wines valued at 25*l.* per pipe, and at the same rate for hogsheads.” The declaration averred the goods insured to be in the plaintiffs and Daniel Dixon, the sailing of the vessel with the goods insured on board on the voyage insured, and a total loss of the goods by the perils of the sea. The defendant pleaded the general issue. The cause was tried before DALLAS, C. J., and a special jury, on the 17th of February, 1821, at the London sittings, when the jury found a verdict for the plaintiffs, damages 300*l.*, subject to the opinion of the Court, on a case, of which the following is the substance.

The plaintiffs are partners with Daniel Dixon, at the Cape of Good Hope, under the firm of Thomas Hudson, Dixon, and Co., and they are also partners in London, under the firm of Thomas Hudson, Donaldson and Co. On the 31st of August, 1819, Daniel Dixon, in the name of his firm, entered into a charter party, under seal, at the Cape of Good Hope, with John Phillips, master of the *Swallow*, by which the vessel was hired to take a cargo of wine for a voyage from the Cape of

Good Hope to Bristol, for orders from the plaintiffs; and having there unloaded such part of the cargo as they should direct, she was to proceed to the ports of Liverpool, Dublin, or Cork, or any two of them the plaintiffs might direct, and discharge the remainder; and upon the delivery of the cargo, freight was to be paid at each port, in certain proportions mentioned in the charter-party. On the 25th September, 1819, Daniel Dixon shipped at the Cape, on board the *Swallow*, the wine in question, which consisted of 241 pipes and 71 half pipes, or hogsheads of Cape wine, the property of, and on the account and risk of himself and the plaintiffs, and of the value, according to the invoice price, of 7,947*l.* of which he advised the plaintiffs by letter, in consequence of which letter the policy in question was effected. The *Swallow*, with the wines insured, sailed from the Cape, on the 9th October, 1819, and in the night of the 21st December following, was driven, by a gale of wind, on the rocks near Portishead, about 13 miles from Bristol, and soon afterwards fell over on her side. On the 23d December, the plaintiffs in London heard of the vessel being on shore, and the same day gave notice of abandonment to the defendant and the other underwriters to the policy. On the 22d December, the master of the *Swallow* went to Bristol, and applied to Messrs. Alexander, merchants and ship-agents there, who were unknown to the plaintiffs and the underwriters, for their assistance, desiring them to do the best for all concerned. Messrs. Alexander engaged lighters and craft to bring the cargo to Bristol, on the 22d December; 11 casks were taken out of the vessel, and a hole was cut in her side, through which the remainder of the cargo was removed into lighters on the six following days, and taken to Bristol. The tide rises at Portishead near 40 feet, and at high water the whole of the cargo was nearly covered with the sea, and the greatest part remained under water for about nine hours, between flood and flood; and, when part had been removed, the residue floated in the vessel. The wines saved consisted of 229 pipes and 67 hogsheads; 71 pipes and 43 hogsheads were sound and full; 44 pipes and 6 hogsheads were impregnated with the salt water; 17 pipes and 4 hogsheads were quite empty; the others had either partially leaked, or were affected more or less with salt water; but in the opinion of some of the witnesses were merchantable. The vessel was afterwards floated to Bristol, and, being incapable of repair, her materials were sold. The plaintiffs had intended to land 100 pipes of the wine at Bristol, and to send the residue to Dublin; but no offer was made by the master or owner of the *Swallow*, to forward the remainder to Dublin. The plaintiffs called a meeting of the underwriters for the 27th December, at Lloyd's Coffee-house, London, at which only three of them attended, and they authorised the plaintiffs to send a person to Bristol, at the expense of the underwriters, to superintend the preservation of the cargo, and to act, in every respect, as if there had been no insurance: the plaintiffs accordingly sent a person to Bristol for that purpose. The defendant did not attend this meeting. The wines saved were placed by Messrs. Alexander in vaults under the king's locks.

After the survey, Messrs. Alexander, without any authority from the plaintiffs or the underwriters, but acting for the benefit of all con

cerned, advertised the wines for sale by auction at Bristol, on the 1st March, 1820, on account of the underwriters, of which they gave a month's notice in the country newspapers and in the Public Leger at London. On the 28th February, Messrs. Alexander received a letter from the attorneys of the defendant, dated London, the 26th February, stating that they had been consulted by several of the underwriters on the Swallow, and noticing the advertisement for the sale; and, that no misunderstanding or prejudice might thereafter arise on that subject, they informed Messrs. A. that the underwriters did not sanction the sale, but denied any right of sale by which their interest could be effected; they denied, that any right of abandonment existed in the insured, saying, that should any of the wines have been lost or damaged by any peril insured against, the underwriters would be ready to pay such loss; that, if any of the wines were not in their port of destination, the underwriters required the same to be forwarded, and would be ready to pay any expenses of charges properly incurred to which they might be liable under the policy. A number of persons from different parts of the country had assembled at the time and place of sale, but in consequence of this letter it was postponed. .

On the 17th March, 1820, the attorney for the plaintiffs wrote to the attorneys for the defendant, proposing that the wines should be sold, without prejudice to any of the questions which had been made, or that might thereafter arise on the part of the insured or the underwriters. No answer having been returned to this letter, the plaintiffs, on the 1st April, 1820, wrote to Messrs. Alexander, requesting that they would sell the wines on account of the concerned, and that they would incur no expenses but such as were necessary. The wines were sold by auction at Bristol, on the 24th April, 1820, and produced the sum of 4044*l.* 2*s.* 6*d.*, which was received by Messrs. Alexander. From this gross produce, they deducted the charges which they had paid for taking the cargo out of the vessel, removing it to Bristol, landing and warehousing it, also the charges of the sale by auction, and their commission of 5 per cent. on the proceeds: and the master and owner of the Swallow having claimed the freight, primage, and port charges upon the wines which were conveyed to Bristol from the wreck, at the rate stipulated in the charter-party, for such part of the cargo as should be discharged there, Messrs. Alexander retained 460*l.* 12*s.* 6*d.*, to answer that claim. By these deductions, the net proceeds of the sale were reduced to 2570*l.* 16*s.* 3*d.*, which, with the freight, primage, and port charges, remained in the hands of Messrs. Alexander, to be paid to the party entitled to receive them. The witnesses for both parties were of opinion, that it was best, for the interest of all concerned, to sell a cargo so circumstanced by public auction at Bristol, and that every thing was done for obtaining the best price for the wines. The question for the opinion of the Court was, whether, upon the facts stated, the plaintiffs were entitled to recover a total loss, with benefit of salvage to the underwriters. If the Court should be of opinion that the plaintiffs were entitled to recover as for a total loss, then the verdict was to stand: but if the Court should be of a contrary opinion, then it was to be referred to an arbitrator, to determine the average loss, subject to any direction which the Court might give thereupon.

Hullock, Serjt., for the plaintiffs. This was a total loss; the assured had a right to abandon at the time of the abandonment, and this right was confirmed, not divested, by subsequent circumstances. From the doctrine laid down by Lord MANSFIELD, in *Goss v. Withers*, 2 Burr. 697, *Milles v. Fletcher*, Dougl. 230, and *Hamilton v. Mendis*, 2 Burr. 1198, confirmed by the decision of *Manning v. Newnham*, Park. Ins. 260, it appears, that an assured may abandon, if there be such an interruption as defeats the voyage, or renders it not worth pursuing. This doctrine has been recognised by Lord ELLENBOROUGH, in *Anderson v. Royal Exchange Assurance*, 7 East, 42, and *Wilson v. Royal Exchange Assurance*, 2 Campb. N. P. C. 623; and though some late cases may seem to have narrowed it, in all such cases the decision has turned on the circumstance that the voyage was worth pursuing, the goods having been of an imperishable nature, or that it did not appear that the voyage could not have been pursued, as in *Bainbridge v. Neilson*, 10 East, 329, *Thompson v. Royal Exchange Assurance*, 16 East, 214, *Anderson v. Wallis*, 2 M. & S. 240, *Patterson v. Ritchie*, 4 M. & S. 393, *Hunt v. Royal Exchange Assurance*, 5 M. & S. 47: in the latter case, the language of the Court shows, that the decision would be otherwise, where the goods are of a perishable nature. In *Thompson v. Royal Exchange Assurance*, there was a clause excepting the underwriters from particular average. In the present instance, three-fourths of the cargo was lost or damaged in such a way, that it would have been injurious to the owners to have sent it on, inasmuch as the wine affected by salt water would become worse every day. In *Buller v. Christie*, 2 M. & S. 374, the loss was holden to be total, because the ship never arrived, though a much larger proportion of the cargo remained uninjured. At all events, the insurers having taken no steps to repudiate the abandonment till two months after they received notice, and three of them, after a public meeting was called, having ordered the plaintiffs to do the best, must be taken to have acquiesced, and cannot now resist the plaintiff's demand.

Taddy, Serjt., for the defendant. Here was no total loss, a considerable proportion of the casks having been saved; nor was the cargo in such a state as to warrant an abandonment, 71 pipes and 43 hogsheads remaining uninjured; but if it was, the plaintiffs, under the subsequent circumstances, cannot recover for a total loss, a policy of insurance being only a contract for indemnity, under which the plaintiff can claim no more than he has actually been deprived of. *Patterson v. Ritchie*. Unless this principle be resorted to, continual difficulty must be experienced on the question, whether the loss in any case is total or partial, and what degree of loss shall be esteemed total; a point on which the customs of various nations and the opinions of text writers have always differed; some requiring a loss of the whole subject-matter of insurance, as under the old French law; others, only three-fourths, as in the new Code de Commerce, Pothier, 186. It is, therefore, that in *Falkner v. Ritchie*, 2 M. & S. 290, Lord ELLENBOROUGH complains of the looseness and generality of the expressions in *Goss v. Withers*. *Manning v. Newnham* turned on the point, that the

voyage could not be pursued (there being no ship at Tortola), not on the ground that it was not worth pursuing. Here, part of the cargo having been saved and landed at the port of Bristol, a ship might have been procured, and the voyage might and ought to have been pursued. What happened was not a total loss of cargo, but a retardation of the voyage. In many instances, a greater proportion of the cargo has been lost than in the present, and yet the loss has not been deemed total; as in *Glennie v. London Assurance*, 2 M. & S. 371, *Thompson v. Royal Exchange Assurance*, *Wilson v. Royal Exchange Assurance*. As to the meeting of the underwriters, only three attended it, and they could not bind the others.

Hullock, in reply, observed, that in *Glennie v. London Assurance*, there was no abandonment; and in *Falkner v. Ritchie*, the recapture was known to the insured before the abandonment was made.

DALLAS, C. J. Under what circumstances, generally speaking, the assured has a right to abandon, so as to state a rule applicable to all cases, is a question of extensive importance and difficult consideration; and this appears from the variety of opinions in the text writers, and the number of cases that have been decided on the subject. That he has in some cases a right to abandon, is clear; and also, that in case of abandonment after a capture, the abandonment is superseded if the ship be recaptured and pursues her voyage beneficially. As this is a case where the ship has been lost, and the cargo materially damaged, is the assured bound to send on the goods taken from the wreck; and if so, in what proportion is he bound to send them on? Is he to send only when half is saved, or a third, or a quarter? Is he bound to send them on at all events, or only under certain circumstances? That the rule on this subject differs is clear from the various text writers; some stating it at a fourth, some at a third, and some at a half; we must therefore act on the custom of the country in which the loss happens. I own I long thought, that if the profits were reduced one-half, it was not incumbent on the owner to prosecute his voyage; whether or no that doctrine (which may be collected from some expressions of Lord MANSFIELD) be sound, or whether the observations made on it by Lord ELLENBOROUGH be just, we are not driven now to decide. My opinion is formed on the circumstances of this particular case, and I wish distinctly to be understood, as not laying down a rule for any other; because in a system of such importance, and where there is such an apparent conflict among the cases, I should be sorry to afford a ground for further doubt, by laying down the rule too generally. But the circumstances of this case do not require that I should do so. What are the facts of this case? The ship was completely lost; the cargo, which was taken out of a hole cut in the ship's side was covered with the sea for nine hours at a time, the greater part of it was materially damaged, and in such a state as to render it unfit to be carried to a greater distance. Only 71 pipes and 43 hogsheads were sound, and the assured had originally intended to dispose of 100 pipes at the port near which the loss happened. The assured immediately gave notice of abandonment, and called a meeting of the underwriters, which three of them attended, and au-

thorized the plaintiffs to act for the benefit of all concerned, taking no other step till after an interval of two months. That the captain acted for the benefit of all concerned is clear, from the testimony of all the witnesses; but, though he did act for the benefit of all concerned, if the insurer has a right to insist on a legal objection, he must have the benefit of that objection. But has he such right in this case, or has he been bound by his own acts or the acts of others? The law is, that the assured shall abandon in reasonable time, that he may not lie by to see whether it may be more to his interest not to abandon; he must, therefore, in reasonable time, (and what is reasonable time is a matter of law for the decision of the Court,) give notice of abandonment. What is reasonable time in each case, must depend on circumstances. When the loss happens in a foreign country, there are no means of giving immediate notice here: if notice be given there, the agent for all parties there must act as beneficially as he can for all. But if the loss happen in this country, and notice of abandonment be duly given, from that moment it becomes the duty of the underwriters to send down an agent to do his best. Here, the earliest notice of abandonment was given; but if the law were to compel the assured to give the earliest notice of abandonment, and at the same time allow the underwriters to lie by and afterwards refuse to accept it, there would be no mutuality of obligation between them. The question, therefore, is, whether the underwriters, by laying by in the present instance, have not induced the assured to believe that the abandonment was acquiesced in. Here, the notice was given in December, the insurers were called together, and, after having done nothing during nearly three months, they interpose just before the sale takes place. Where there are circumstances to show an acquiescence, it is not allowable for the underwriters, after such an acquiescence, to come forward and interpose. I think there was such an acquiescence here. If it were necessary, I might go farther, and say the cargo was so damaged and reduced as to render the loss total; but, on the ground of the underwriters having acquiesced in the abandonment, and narrowing my decision to the circumstances of the present case, I think the plaintiffs are entitled to judgment.

PARK, J. I am of opinion this was a total loss. After what has fallen from my Lord Chief Justice, it is not necessary for me to go into the whole case, but I may be permitted to doubt whether it is necessary to narrow the old rule respecting abandonment; and I think that some of the cases on that subject cannot be supported to their full extent. I, for one, have never been able to comprehend the case of *Falkner v. Ritchie*, which I have the less hesitation in avowing, inasmuch as the Lord Chancellor and Lord REDESDALE have expressed themselves to labour under the same difficulty. But *Hunt v. The Royal Exchange* I think to the purpose for the case before us, especially in the arguments of the Judges; the cargo, there, being of an imperishable nature, the Court confined themselves to treating it as a case of retardation only; but Lord ELLENBOROUGH said, "If indeed the cargo had been of a perishable nature, this would not have been a case of retardation only, but of destruction of the thing insured."

As to the point relied on in the present case by my Lord Chief Justice; the underwriters, having never repudiated the abandonment till the end of February, must be taken to have acquiesced in it. It being clear that the assured must, if he abandon, immediately elect to do so, it is but fair that the underwriter should also, as soon as may be, make his election. If the underwriter says he will not accept the abandonment, the assured may elect to proceed for a total loss, or continue his voyage; and where there is an obligation on one side, there ought also to be one on the other. In one stage of *Smith v. Robertson*, 2 Dow. 474, in the House of Lords, the Lord Chancellor evidently felt such dissatisfaction at the decisions of *Bainbridge v. Neilson*, and *Falkner v. Ritchie*, that he wished to have the point argued before the twelve Judges. *Smith v. Robertson* was afterwards decided upon a collateral point, and it became unnecessary to give any opinion on *Bainbridge v. Neilson*, and *Falkner v. Ritchie*. But the Lord Chancellor said, (2 Dow. 479,) "An election might, it was contended, be made in these cases, to abandon or to take the chance of recapture, and claim for a partial loss. But here, they said, they had made their election, and that this was founded on their right to do so; and that, at the time they claimed, they had the right, because a present demand could not properly be made without a present right; and that if there was a present right, there was a corresponding obligation to accede to it *de presenti*;" evidently showing, that he thought that the underwriter should say, at the earliest opportunity, whether he will accept the abandonment or not. On a subsequent day, his Lordship said, in the same case, that the underwriters could not be allowed to say that the loss was not total, after they had admitted that it was, and acquiesced in the abandonment as for a total loss. Upon the same principle, I am of opinion that here is enough to satisfy the Court, that there was an acquiescence or silence on the part of the underwriters, which admits that the assured were acting in the best way for the interests of all; and I am of opinion, that this acquiescence has completed the right of abandonment.

BURROUGH, J. Most of the cases connected with the subject of insurance depend on their own particular facts. It is admitted that, if the loss here was in its nature total, the assured have a right to recover. I think the loss was in its nature total. The ship was wrecked, and the greater part of the cargo damaged and under water for nine hours at a time. Did the loss continue total? The plaintiffs abandoned on the 23d of December, and gave the underwriters notice, that is, they insisted on a total loss, and followed it up in the best way they could. The defendant, having never interposed during all this time, must be taken to have accredited what the plaintiffs did. A meeting of the underwriters was called, and if this was not the usual way of proceeding, it should have been so stated in the case. A certain number of them attended; and my opinion is, that the defendant was bound by what was done upon that occasion. The underwriters who attended authorised the plaintiffs to send a person to Bristol, at the expense of the underwriters, to superintend the preservation of the cargo, and to act in every respect, as if there had been no insurance. As this part

of the case stands, it is as much as to say that the policy was at an end. The case then goes on, "and the plaintiffs accordingly sent a person to Bristol for that purpose." Under these circumstances matters went on a considerable time, and till the 28th of February, there was not a word of objection on the part of the defendant; a notice to countermand the sale of the damaged wines was then sent, after the sale had been advertised, and when all opportunity of forwarding the wines with advantage by another vessel was lost to the plaintiffs.

This case does not trench on any former decision, but depends on its own circumstances, and clearly entitles the plaintiffs to recover for a total loss. If the underwriters meant otherwise, they should have acted otherwise; as they have acted, they must be taken to have acquiesced in the abandonment.

RICHARDSON, J. I think this was such a loss as gave the assured a right to abandon, that subsequent circumstances have not taken away that right, and that, therefore, the plaintiffs must recover. In *Mitchell v. Edie*, 1 T. R. 615, ASHURST, J., and BULLER, J., expressed an opinion, that where a voyage is lost, but the property is saved, the owner may abandon. In *Manning v. Newnham*, the same opinion is expressed. That doctrine, perhaps, is not carried so far now; it is not every loss of voyage that will justify an abandonment;—a retardation is not sufficient; but that there may be losses of voyage which will justify an abandonment, is admitted in the last case of *Hunt v. The Royal Exchange*, and that too by those Judges who had most contributed to narrow the former doctrine. It seems to me, that the present is a loss of voyage of that description. What are the facts? The ship is thrown on her side, exposed to the operation of wind and tide; at high tide full of water, her cargo floating within, it being uncertain whether or not it might not perish the next hour. The abandonment was then made under circumstances which fully warranted it. Endeavours were made, at a great expense, to save part of the cargo, but in the result, it appears that three-fourths of the whole cargo was spoiled or lost; and, in the opinion of all the witnesses, it was for the interest of all parties to finish the adventure at Bristol. This was a total loss of voyage; and, though there was a partial recovery of one-fourth of the cargo, the facts being such as rendered it prudent for the owners not to proceed further, this was a loss which warranted the notice of abandonment. It is material, that that part of the cargo which was damaged by the salt water must have become worse by delay, and consequently by carriage on to Ireland. I also agree, that, if the underwriters intended to resist the abandonment, they should have taken that step with more promptitude, instead of waiting two months.

Judgment for the plaintiffs.

DAVISON v. MEKIBBEN.—p. 112.

A vessel trading to and from London to Belfast, and proceeding down the Thames on her voyage to the latter port, not laden with corn, grain, meal, flour, bread, or biscuits, is not within the second section of the 52 G. 3, c. 59, which exempts from the obligation of taking a Trinity House pilot on board, all coasting vessels, and all Irish traders using the navigation of the Thames as coasters.

DEBT on the pilot act.* The declaration contained two counts; one for assuming, and the other for continuing in, the charge and conduct of a ship or vessel proceeding down the river Thames, without being duly licensed so to act, after a pilot duly licensed and qualified had offered to take charge of her. Plea, general issue. At the trial, before DALLAS, C. J., (Westminster sittings after Hilary term last,) a verdict was found for the plaintiff, for a penalty of 20*l.*, subject to the opinion of the Court upon the following case.

By the stat. 46 Geo. 3, c. 97, s. 2, it is enacted, that every person exporting corn, grain, meal, flour, bread, or biscuit, from Great Britain to Ireland, or from Ireland to Great Britain, shall declare before the collector, comptroller, or other chief officer of the customs at the port from whence the exportation is about to take place, that such corn, &c., is intended to be exported to Great Britain or Ireland, as the case may be; and such exporter shall thereupon receive the like cocket, certificate, letpass, or transire, as is given and conformable to all the like regulations in force, in case of goods sent coastways from one port of Great Britain to another port therein, or from one port in Ireland to another port in Ireland, respectively.

The *Levant*, the ship in question, during the last eight years, had been employed as a trader between Belfast and London, except one voyage, when she went to Liverpool. On the 13th April, 1821, she was proceeding down the river Thames, bound for Belfast, being laden with a general cargo of tea, sugar, seeds, wearing apparel, &c., but not with corn, grain, meal, flour, bread, or biscuits. The defendant was then master of the ship, and refused to allow a licensed pilot to take charge of her. There are two offices in the custom-house at which ships report and clear out, the *foreign* office and the *coasting* office. The *Levant* cleared out at the *foreign* office. A clerk from the custom house stated, that she would have reported or cleared out in the same manner, had she been loaded with corn. Whether a ship shall report or clear out at the foreign office or coasting office, does not depend upon the cargo she carries, but the place from or to which she is bound. The same clerk treated all Irish vessels as foreign. Irish vessels pay a dock duty.

If the Court should be of opinion that this vessel did not, under the circumstances above stated, fall within the saving clause contained in the second section of the pilot act, (52 Geo. 3,) which exempts from the obligation of taking a Trinity House pilot on board all *coasting* vessels and all Irish traders using the navigation of the river Thames as coasters, then the verdict was to stand; if not, a nonsuit was to be entered.

* 52 Geo. 3, c. 59, s. 84.

The case was argued on a former day in this term.

Lens, Serjt., for the plaintiff. This vessel was not a coaster within the meaning of the act of parliament on which this action is brought. A coaster is a vessel which goes from port to port in Great Britain, and which, being never absent in foreign parts, may be supposed to have so constant a knowledge of those ports as not to require a pilot. That vessels coming from Ireland to the Thames are not considered coasters by the legislature, appears clearly from the provisions of 46 Geo. 3, c. 97, s. 2, for there, in order to favour the corn trade, vessels coming from Ireland to the Thames with a cargo of corn, are allowed the privileges of coasters; but such an enactment would have been superfluous, if vessels coming from Ireland to the Thames generally, were deemed coasters.

Vaughan, Serjt., for the defendant. The question arises solely on the construction of the statute 52 Geo. 3, c. 39, and the statute 46 Geo. 3 applies to a different matter. The object of the legislature was, to guard against the damage which might arise from unskilful persons navigating the river Thames; and many vessels, which, from the shortness of their voyages, may be supposed to frequent the Thames as much as coasters, are allowed the privilege of navigating the river without a pilot; as colliers, vessels trading to Norway, the Cattagat, and Baltic, all *constant* traders inwards, from the ports between Bologne inclusive, and the Baltic, and others; all which are merely specified as examples, and not as defining the limits of the privilege. So that vessels trading regularly from Ireland, and, therefore, using the river five or six times a year, must be deemed to fall within the same principle. Besides which, this is a penal statute, which the Court will not construe with severity.

Lens, in reply, observed, that the statute was rather remedial than penal, being intended to prevent the mischiefs which had before arisen from the want of a skilful pilot, in a river so crowded as the Thames.

DALLAS, C. J. My present impression is, that this vessel was not a coaster within the meaning of the 52 Geo. 3, and that trading from Ireland to Great Britain is not, in the ordinary sense of the word, coasting. In order to see whether a vessel trading from Great Britain to Ireland, or from Ireland to Great Britain, comes within the meaning affixed by the legislature to the term coaster, we must see what is the meaning given to the word in other acts of parliament, as in the 31 Geo. 3, c. 39, and 46 Geo. 3, c. 97. It seems clear, from the language of those acts, that by "coasters," are meant, vessels trading from and to any port or place, or ports and places, in Great Britain, or from one port of Great Britain to another port therein, or from one port in Ireland to another port in Ireland, and, therefore, speaking at the moment, I think this was not a coasting vessel. If not protected as a coaster by the 52 Geo. 3, is she within the protection of the 46 Geo. 3? The protection of that statute seems not to be afforded, on account of the employment of a vessel in a particular voyage, but on account of her conveying a particular cargo. Some little difficulty arises with me on the expressions of the 52 Geo. 3; and as "all Irish vessels using the

Thames as coasters," are mentioned in the second section of that statute, I should have thought, had it not been for expressions in the other statute, that the exemption was applied by reason of the employment, and not by reason of the particular cargo, especially when the "using the Thames as coasters," seems contrasted with the using it as strangers or as foreign vessels. But the 46 Geo. 3 is positive as to the cargo, and will not admit of this construction.

PARK, J., of the same opinion.

BURROUGH, J. I have great doubts on the subject. There is no reason why a vessel frequenting the Thames, as this vessel did, should employ a pilot; the principle being, that foreign vessels should be piloted, but not vessels, the crews of which, from frequent navigation, must be supposed to know the river. It is not necessary they should be coasters; it is sufficient if they use the Thames *as* coasters; and no other certain meaning can be affixed to the words "*as* coasters."

RICHARDSON, J., declined expressing any opinion, as the case was to undergo consideration.

DALLAS, C. J., afterwards said that the case might be considered as decided.

And now the Court awarded

Judgment for the plaintiff.

FULLER v. ABRAHAMS.—p. 116.

Held, that a purchaser did not acquire any property under a sale at auction at which he and his friend were the only bidders, the rest of the company being deterred from bidding by the purchaser's stating to them he had a claim against, and had been ill used by, the late owner of the article.

A BARGE being put up for sale by auction, the plaintiff addressed the company present, saying he had a claim against the late owner, by whom he said he had been ill used; whereupon no one offered to bid against the plaintiff. The auctioneer refusing to knock down the barge to the plaintiff's single bidding, a friend of the plaintiff bade a guinea more, and the plaintiff then made a second and higher bidding, amounting, however, to only one-fourth of the prime cost of the barge. The auctioneer, being indemnified by the vendor, who had taken the barge in execution, refused to deliver the barge to the plaintiff, and he, having sued for the barge in trover, the foregoing facts were proved at the trial, before DALLAS, C. J., London sittings after Hilary term, 1821, when his Lordship charged the jury, that there was no legal sale under the circumstances. The jury, however, found for the plaintiff.

A rule nisi for a new trial having been obtained on a former day,

Pell, Serjt., now showed cause against the rule, contending, that this was a case peculiarly within the province of the jury, and that no fraud had been proved.

The Court, however, being clearly of opinion that a sale under these circumstances could not be supported, made the Rule absolute.

HOUSE *v.* The Treasurer to the Commissioners of the Navigation of the Rivers THAMES and ISIS.—p. 117.

Trespass in some named and some unnamed closes of the plaintiff, and also for taking his goods and chattels. Pleas : 1st, not guilty to the whole declaration ; 2dly, as to part, a special plea of license ; 3dly and 4thly, as to part, certain special pleas, on which the jury were, by consent, discharged from giving any verdict ; 5thly, as to the unnamed closes *lib. ten.* The replication took issue on the plea of not guilty, traversed the license mentioned in the 2d plea, and also new assigned on that plea ; and, as to the unnamed closes, contained a *nolle prosequi*. The rejoinder took issue on the traverse, judgment was suffered by default on the new assignment, and the cause went down to trial, as well to try the issues joined, as to assess the plaintiff's damages on the new assignment. The jury found for the plaintiff on the general issue (without any damages;) for the defendant, on the plea of license ; and assessed to the plaintiff, on the new assignment, one shilling damages and one shilling costs : *Held*, that the plaintiff was entitled to the general costs of the cause, including those of the trial, the costs of the issue found for the defendant being deducted, but no costs being allowed to the defendant on that issue.

THIS case, the facts and arguments in which are sufficiently stated in the following judgment of the Court, which was now delivered, was argued in Trinity term last, by *Peake*, Serjt., for the plaintiff, and *Lowes*, Serjt., for the defendants, when the cases of *Thornton v. Williamson*, 13 East. 191 ; *Compere v. Hicks*, 7 T. R. 727 ; *Martin v. Vallance*, 1 East. 350 ; *Brooke v. Willet*, 2 H. Bl. 435 ; *Hullock on costs*, 112 ; *Day v. Hanks*, 3 T. R. 654 ; *Hull*, 374 ; *Griffiths v. Davies*, 8 T. R. 466 ; *Hull*, 376 ; *Poston v. Stanway*, 5 East. 261 ; *Hull*, 369 ; and *Trotman v. Holder*, Ante, i, 222, were cited.

DALLAS, C. J. The plaintiff has obtained a rule, calling on the defendant to show cause why one of the prothonotaries of this court should not tax the plaintiff his full costs of this cause, deducting therefrom the costs on the issue found for the defendant, but not allowing the defendant any costs on that issue.

This is an action of trespass, for trespasses charged to have been committed by the commissioners in some named and some unnamed closes of the plaintiff, and also for seizing and taking his goods and chattels. The defendant pleaded, 1st, not guilty to the whole declaration ; 2dly, as to part, a special plea of license ; and, 3dly and 4thly, as to part, certain special pleas, on which the jury have, by consent, been discharged from giving any verdict ; and, 5thly, as to the unnamed closes, *liberum tenementum*.

The plaintiff, by his replication, took issue on the plea of not guilty ; traversed the license mentioned in the second plea, and also new assigned on that plea ; and as to the unnamed closes, entered a *nolle prosequi*.

The defendant, by his rejoinder, took issue on the traverse, and suffered judgment by default on the new assignment ; and the cause went to the assizes, as well to try the issues joined, as to assess the plaintiff's damages on the new assignment.

At the trial the jury found a verdict for the plaintiff on the general issue, (without assessing thereon any damages,) for the defendant, on the plea of license : and on the new assignment, they assessed to the plaintiff one shilling damages and one shilling costs.

The rules established by *Postan v. Stanway*, 5 East. 261; *Trotman v. Holder*, Ante, i, 222, and other cases on the one part, and by *Day v. Hanks*, 3 T. R. 654; *Griffiths v. Davies*, 8 T. R. 466, and other cases on the other part, seem to amount to this; that where the plaintiff's demand is altogether denied by the defendant's pleas, and at the trial the plaintiff obtains a verdict for part of his demand, and the defendant obtains a verdict as to other part, the plaintiff is entitled to the costs of the issues found for him, which include the general costs of the trial, but do not include the costs of the issues found for the defendant, on which last-mentioned issues, however, the defendant is not entitled to claim any costs from the plaintiff; but where the defendant suffers judgment by default as to part of the plaintiff's demand, and pleads only as to other part, and the plaintiff takes issues on the pleas, and at the trial *all* the issues are found for the defendant, there the defendant is entitled to the costs of the issues found for him, and the plaintiff is entitled only to the costs of the judgment by default.

It seems to us, that the present case falls within the former of those rules; for here the defendant, by pleading the general issue to the whole declaration, made it necessary for the plaintiff, in order to get rid of that plea, which would otherwise have barred his whole action, to go to trial at the assizes, and he could not by any other means have obtained damages or costs on the judgment by default; the plaintiff, therefore, having obtained a verdict on the plea of the general issue, and on assessment of damages on the judgment by default, is entitled to the general costs of the cause, including those of the trial, the costs of the issue found for the defendant being deducted, but no costs being allowed to the defendant on that issue.

In this case, the learned Judge certified, under the statute 8 & 9. W 3, c. 11, s. 4, that the trespass whereof the defendant was found guilty was wilfully and maliciously committed by him. It has been argued on behalf of the defendant, that this certificate cannot avail, because the statute, it is said, does not apply to trespasses confessed by a judgment by default, but only to such whereof the defendant is found guilty at the trial; and although this defendant has been found guilty on the general issue; yet that, it is said, will not avail, because no damages have been assessed under that issue. On this point we consider it unnecessary to give any opinion, because independently of the certificate, we think that the plaintiff is entitled to the costs of the trial, being the only mode by which, in consequence of the defendant's pleading, he could obtain an assessment of damages on the judgment by default.

HENRY MACHIN and MARY VESSEY v. ELIZABETH REYNOLDS.—p. 121.

Bequest of personalty to testator's sister and nephew during their joint lives, share and share alike, and to the survivor for life, *in case there should happen to be no issue living of them, or either of them; but in case both, or either, should leave any issue*, to the survivor of the said sister or nephew, one moiety of the personalty for his or her life, the other moiety, or such part of the same as should be thought needful by the executor of the party dying and leaving issue, to be applied to the maintenance and education of all and every the child and children of the party so dying, during the respective minorities of such child or children; and after the death of the survivor of the said sister and nephew, the survivor's moiety in the personalty, or such part thereof as should be thought necessary by the executor of such survivor, to be applied to the maintenance and education of all and every the child and children of such survivor, during their respective minorities, and *when and as* such several children of the said sister and nephew, (if there should be any,) should respectively attain the age of 21, the whole of the said personalty unto and equally amongst all of them, share and share alike; and if but one, then to such only child; the persons who eventually should have the payment of the shares, to have due regard to the expenditure of the children during their minorities, in order to the division of the property being made as equal as possible. But if the nephew only should have issue living at the time of the death of survivor of sister and nephew, the property was to be divided among all his children, in such shares as he by will should appoint; and in default of such will, equally among all such children. If the sister and nephew should both die without leaving issue, the property was given to such person or persons, in such shares as the survivor of sister and nephew should by will appoint; and in default thereof, to testator's personal representatives.

Then followed a devise of real estate to the sister and nephew for their joint lives, and to the survivor for his or her life, *in case there should be no issue living of them, or either of them; but in case both, or either of them, should leave any issue*, then to the survivor of the sister and nephew an undivided moiety of the real estate for his or her life; the rents and profits of the other undivided moiety to be applied to all and every the child and children of either of them, (the sister and nephew,) so dying, during their several minorities, if there should be occasion for it, in like manner as was directed regarding the personal estate; and after the death of the survivor of the sister and nephew, the remaining moiety of the rents and profits of the real estate was to be applied in like manner, if there should be occasion, to all and every the child and children of such survivor, during their several minorities; and *when and as* such several children of the sister and nephew, (if any such there should be,) should respectively attain the age of 21, the whole of the real estate was given unto and equally amongst all such children, share and share alike, if more than one, as tenants in common, and to their respective heirs and assigns, for ever; and in case the sister and nephew should both die without leaving, or, there being issue, they should die under 21 without issue, the real estate was given to G. M.

Held, that under this will, a child of the nephew, the only issue of nephew or niece alive at the death of the deviser, took, at the death of the deviser, a vested estate in fee simple in remainder in the deviser's real property, subject to be devested in part by the birth of other children of the nephew or niece, or either of them, and determinable altogether in the event of such child dying in the lifetime of the nephew, or under age without issue.

THE following case was directed by His Honour the Vice-Chancellor, to be sent for the opinion of this Court.

John Vessey was, in his lifetime and at the time of his death, possessed of considerable personal property, and seized of an undivided third part, in certain messuages, lands, tenements, and hereditaments, called upper Hexgrove Farm, in the parish of Southwell, in the county of Nottingham, by virtue of an indenture of demise, dated 22d September, 1798, whereby the said messuages, lands, tenements, and here.

ditaments were demised to him, and two other persons therein named, their heirs and assigns; to hold to them, their heirs and assigns, as tenants in common, during the lives of the persons therein named. Livery of seisin was endorsed upon the deed.

John Vessey, by his will, after various specific and pecuniary legacies, gave all the residue of his personal estate and effects, of what nature and kind soever, as follows: the interest, dividends, and proceeds arising from such residue, to his sister, Mary Vessey, and his nephew, Henry Machin, during their joint lives, to be equally divided between them, share and share alike, to and for their respective use and benefit, and to the survivor of them, during her or his life, in case there should happen to be no issue living, lawfully begotten of them, or either of them; but, in case both or either of them should leave any such issue, then to the survivor of them, the said sister and nephew, one moiety or half-part only of the interest, dividends, and proceeds of the residue of the personal estate, for and during his or her life; the other moiety or half-part thereof, or such part of the same as should be thought needful, by the executors or administrators of either of them, so dying and leaving issue as aforesaid, to be paid and applied for and towards the maintenance, education, and bringing up all and every the child and children of such of them the said sister or nephew so dying during their several and respective minorities; and from and after the death of the survivor of them, the said sister and nephew, the other moiety or half-part of the interest, dividends, and proceeds, or such part thereof as should be thought proper by the executors or administrators, of such survivor of them the said sister and nephew, to be applied in like manner, for and towards the maintenance, and bringing up of all and every the child and children of such survivor, during their several and respective minorities; and when and as such several children of the said sister and nephew, (if any such there should happen to be,) should respectively attain the age of 21 years, then the whole of the residue of the said personal estate, unto and equally among all such children of the said sister and nephew, share and share alike; and if but one, then to such only child: the person or persons who eventually should have the payment of the above shares, to have due regard to the expenditure on such several and respective children during their minorities, in order to the division of the said personal estate being made as equal as possible amongst them; but if it should happen that the said nephew only should have issue living at the time of the death of the survivor of them the said sister and nephew, then such residue of the said personal estate, was to be paid in like manner, unto and amongst all his children, in such parts, shares, and proportions, manner and form, as he should by his last will direct and appoint; and in default of such will, the residue of the personal estate was bequeathed unto and equally amongst all such children of the said nephew; provided, that in case the said sister and nephew both died, without leaving any lawful issue of her or his body living, then the whole of the residue of the said personal estate was given to such person or persons, and in such parts, shares, and proportions, manner and form, as the said sister and ne

pieuw should by will appoint; and in default thereof, to the testator's representatives. All and every the testator's real estate whatsoever, and wheresoever, was given and devised unto the testator's said sister, and his said nephew, for and during the term of their joint natural lives, and to the survivor of them two, during her or his life, in case there should happen to be no issue living, lawfully begotten of them, or either of them; but in case both or either of them should leave any such issue, then to the survivor of them the said sister and nephew, one undivided moiety or half-part only of the said real estate, for and during his or her life; and the rents and profits of the other undivided moiety of the said real estate, were to be paid and applied unto all and every the child and children of either of them, the said sister and nephew, so dying during their several minorities, if there should be occasion for it, in like manner as was thereinbefore directed, regarding the interest and proceeds of the personal estate; and from and after the death of such survivor of the said sister and nephew, the remaining half-part of the said real estate was to be paid and applied in like manner, if there should be occasion, unto all and every the child and children of such survivor of the said sister and nephew, during their several minorities; and when and as such several children of the said sister and nephew respectively, if any such there should happen to be, should respectively attain the age of 21 years, then the whole of the said real estate was given unto and equally amongst all such children of the said sister and nephew respectively, share and share alike, if more than one, as tenants in common, and to their several and respective heirs and assigns for ever; and if but one, to such only child, his or her heirs and assigns for ever; and in case the said sister or nephew should both happen to die without leaving lawful issue of her or his body, or there being such, they should happen to die under the age of 21 years, and without issue, then all and every the said real estate was given unto George Mosley, of Farnsfield, farmer, his heirs and assigns for ever. The testator appointed his said sister, Mary Vessey, and his nephew, Henry Machin, executrix and executor of his will.

The testator died on the 3d day of February, 1819, without having revoked or altered his will. Henry Machin and Mary Vessey (who remains unmarried) are his co-heirs at law. Henry Machin, at the death of the testator, had a daughter, Elizabeth Susannah, who was then and is now his only child. On the 10th October, 1820, Henry Machin and Mary Vessey made an agreement in writing with the defendant, Elizabeth Reynolds, whereby Henry Machin and Mary Vessey agreed to sell, and the said Elizabeth Reynolds agreed to purchase the said undivided third part of the said messuages, lands, tenements, and hereditaments devised by the will of the said John Vessey; and Henry Machin and Mary Vessey were, by the said agreement, bound to make a good title to the premises, and convey the same to the said Elizabeth Reynolds. In order to make title to the said hereditaments, Henry Machin and Mary Vessey, paying a compensation therefor, obtained of George Mosely, by an indenture, dated on or about the 20th January, 1821, a release of all his interest or possibility under the testator's will; and by

certain indentures of lease and release, bearing date respectively the 21st and 22d days of January, 1821, and made between the said Henry Machin and Mary Vessey, of the one part, and Robert Swan, therein described, of the other part, reciting, among other things, the said indenture of demise for lives, and the will and death of the said John Vessey, leaving the said Henry Machin and Mary Vessey his co-heirs at law, and further reciting, that, for the purpose of destroying the contingent remainders expectant on the life estates of the said Henry Machin and Mary Vessey of and in the third part of the messuages, lands, and hereditaments comprised in the said indenture of demise, and given and demised by the said will of the said John Vessey, by merger of the said life estates of the said Henry Machin and Mary Vessey, in their reversionary estate or interests of and in the same third part, as heirs at law of the said John Vessey: It was witnessed, that in pursuance and performance of the said agreement, and upon such considerations as were therein mentioned, the said Henry Machin and Mary Vessey, and each of them, granted, bargained, sold, released, and confirmed, unto the said Robert Swan, his heirs and assigns, (in his possession then being, by virtue of a lease for a year, as therein mentioned,) the said undivided third part or share, late of the said John Vessey, of and in the said messuages, lands, and hereditaments comprised in the said indenture of demise, to hold the same unto the said Robert Swan, his heirs and assigns, for and during the natural lives of the persons named as *cestui que vies*, in the said indenture of demise, and the survivor of them, freed and discharged of and from all the contingent interest given and devised, in and by the said will of the said John Vessey, to the uses and upon the trusts therein limited, expressed, and declared, of and concerning the same, that is to say, (amongst others,) to such uses and upon such trusts, and for such ends and purposes, and with, under, and subject to such powers, provisions, declarations and agreements, as the said Henry Machin and Mary Vessey, at any time or times, and from time to time jointly, during their joint lives, by any deed or deeds executed as therein was provided, should jointly direct, limit, and appoint: and in default thereof, upon such further uses and trusts, for the benefit of the said Henry Machin and Mary Vessey respectively as therein were mentioned.

The questions for the opinion of the Court were, first, whether Elizabeth Susannah Machin, the daughter of Henry Machin, took any and what estate in the said undivided third part of the messuages, lands, tenements, and hereditaments comprised in the indenture of demise, upon the death of the said John Vessey, and under his said will.

Second, whether the said Robert Swan, Henry Machin, and Mary Vessey respectively, took any and what estate, interests, or rights, respectively, in the said messuages, lands, tenements, and hereditaments, under the said deeds, dated respectively the 21st and 22d of January, 1821.

Hullock, Serjt., for the plaintiffs. The daughter of Henry Machin took only a contingent remainder in the deviser's real property, under the will of the deviser. The deviser's intention, as it may collected

from various expressions in the will, was, that none of the limitations over should take effect till the death of his sister or nephew. There are many cases which decide, that when the expressions "*leaving issue*," or "*leaving heirs of her body*," are employed, the issue intended are only those who shall be living at the death of the party who is to leave them. *Forth v. Chapman*, 1 Peere Wms. 664, 2 Eq. Ca. Ab. 292, pl. 16, 359, pl. 15, *Read v. Snell*, 2 Atk. 646. So the expression "*when and as*," applied to the period of a party's coming of age, has been holden to mean, that nothing shall vest till that time. A legacy to A. B. *when he is of such an age*, lapses, if he dies before the age indicated. The present will may be considered in two divisions; that which relates to the personalty and that which relates to the realty, though the expressions are nearly alike in both. In that part which relates to the personalty, the property is bequeathed to the sister and nephew and to the survivor of them, *in case* there should happen to be no issue of either of them living; but in case either of them should *leave* any issue, then, in certain proportions to such issue. So, as to the realty, the limitation over is, *in case* either of them shall *leave* any issue. That can only mean such issue as should be living at the death of the party. Then, as it could not be ascertained beforehand who would or would not be living at the death of the sister or nephew, the remainders over, depending on an uncertainty, were clearly contingent; and as such, were destroyed by the conveyance of the 21st and 22d of January, 1821, the freehold interest on which they were supported, having thereby ceased. What estates Robert Swan, Henry Machin, and Mary Vessey, respectively take by that conveyance, depends on the determination of the question touching the remainders in the will.

Pell, Serjt., for the defendant. The daughter of Henry Machin, the deviser's nephew, takes a vested remainder in the deviser's real property, subject to the life interest of her father and aunt, subject to the fund for the maintenance of children, and subject to open and admit to participation, after-born children. This is the intention of the testator, to be collected from the whole will; he meant the children of his nephew and sister, to take at the deaths of the nephew and sister, and to take equally, which they would not do if the remainders were holden to be contingent, as the nephew and niece might then bar them, for want of a supporting freehold. The expression *when and as* does not fix the time of a contingency, but points out when a vested interest shall fall into possession. *Boraston's case*, 3 Rep. 19. *Goodtitle v. Whitby*, 1 Burr. 228. *Doe v. Lea*, 3 T. R. 41. The law favours vested interests, and if there are any words to effect the testator's intentions, they must receive a liberal construction. *Ives v. Legge*, 3 T. R. 488, in note. As to the cases touching the expression "*leaving issue*," they were, like all other cases on wills, decided on the particular instrument, and cannot be safely applied to the construction of any other. According to the definition of WILLES, C. J., in *Parkhurst v. Smith*, Willes, 388, there are but two sorts of contingent remainders, and the circumstances on which the present remainders are supposed to depend (namely the number of children that may be living at the

death of the nephew and sister) will not render a remainder contingent within that rule.

Hullock, in reply, urged, that the greatest inequality in the division of the property might ensue, if these remainders were holden to be vested; for if one or more of the children should die, the share of the parties so dying would go to an elder brother, who might thus obtain eleven-twelfths of the whole property, while another brother had only one-twelfth; that the rule touching contingent remainders, laid down by WILLES, C. J., had always been deemed too narrow, and that the number of children who might be living at the death of a parent, was clearly laid down by Fearn as one of the circumstances which might render a remainder contingent.

The following certificate was afterwards sent. This case has been argued before us by counsel. We have considered it, and are of opinion, that Elizabeth Susannah Machin, the daughter of Henry Machin, took, upon the death of the said John Vessey, and under his will, an estate in fee simple in remainder, during the lives of the *cestui que vies*, in the undivided third part of the messuages, lands, tenements, and hereditaments, comprised in the said indenture of demise, subject to be divested in part, by the birth of other children of the said Henry Machin and Mary Vessey, or of either of them, and determinable altogether in the event of her dying in the lifetime of the said Henry Machin, or under the age of twenty-one, without leaving issue.

Second, That the said Robert Swan, Henry Machin and Mary Vessey, did not, nor did either of them, take any estate, interest, or right under the said deeds of the 21st and 22d of January, 1821, which can in any way defeat or affect the remainder, which we conceive to have been vested in the said Elizabeth Susannah Machin, as aforesaid.

R. DALLAS.

J. A. PARK.

—J. BURROUGH.

J. RICHARDSON.

KELLY v. CLUBBE.—p. 130.

Debt will not lie during the life of the annuitant, for the arrears of any annuity for life issuing out of lands, though the declaration avoids stating that the grantor had a freehold in the lands, and alleges that he received the rents of the lands to the use of the grantee.

THE plaintiff declared in debt, for the arrears of an annuity granted by the defendant to the plaintiff's wife, for life; the declaration alleging, that by an indenture between the defendant of the first part, and one Sarah Clubbe of the second part, (which said Sarah had since intermarried with, and was then the wife of the plaintiff,) and one John Jeyes of the other part, the defendant, for the considerations therein stated, did grant unto the said Sarah and her assigns, during the term of her natural life, a certain annuity, annual sum or rent charge of

200*l.* to be yearly issuing, payable, and going out of certain premises in the said indenture particularly mentioned: that after the making of the indenture, and after the plaintiff's marriage with the said Sarah, and during her life, to wit, on the 25th March, 1821, 200*l.*, for four quarterly payments of the said annuity or rent charge, which ended and expired on the day and year aforesaid, became, and was due, owing and payable, and still was in arrear and unpaid, contrary to the effect of the indenture and the defendant's covenant: and that the defendant, during the term in which the arrears had accrued, and since the said intermarriage of the plaintiff, had received the rents and profits of the premises to the use of the plaintiff, whereby, &c. Then followed the common money counts. Demurrer and joinder.

Hullock, Serjt., for the defendant, was stopped by the Court, who called on

Onslow, Serjt., for the plaintiff, asking him if he could distinguish the case from *Webb v. Jiggs*, 4 M. & S. 113. *Onslow* said, in that case the grantor of the annuity was alleged to be seized in fee of the lands on which the annuity was charged, and though it was clear, that debt would not lie during the life of the annuitant, for the arrears of an annuity for life, issuing out of a freehold, yet there was no such decision with respect to annuities charged on terms for years; that there was nothing unusual in granting an annuity for life out of a long term for years, as out of a term for 500 years; and that it did not appear on the declaration, that the defendant had a freehold in the premises charged with the annuity, or indeed, that he had not merely a term for years; that, if it would have appeared by the indenture referred to, that the defendant had a freehold in the premises in question, the defendant ought to have set it out on oyer; and that, at all events, debt would lie on the allegation, that the defendant had received the rents and profits of the premises to the use of the plaintiff.

But the Court thinking, that this case was not to be distinguished in principle from *Webb v. Jiggs*; that it must be taken, the grantor had a fee in the premises when nothing to the contrary appeared, and that the circumstances of the grantee's taking a freehold, was of itself sufficient to bar the action, they gave

Judgment for the defendant.

GOSS v. WATLINGTON.—p. 132.

Entries made by a deceased collector of taxes in a public book, handed down to him by his predecessor in office, and afterwards delivered to his successor, are evidence against his surety, in an action on a bond conditioned for the due performance of the collector's duty and the delivery up of the books kept by him in his office.

Querc. Whether the receipts signed by such collector, for moneys payable to him in his official capacity, are evidence against his surety in such case.

THE defendant had suffered judgment by default in an action of debt on bond. After reciting that one Thomas Watts had lately been elected and chosen the beadle of the ward of Queenhithe, in the city of

London, and that, in order to secure the payment of all taxes, rates, duties, and other assessments which he might by virtue of such office, be at any time appointed to collect and receive unto the plaintiff, the deputy of the ward, he the said Thomas Watts and the said defendant had agreed to enter into the above written obligation: The condition of the bond stated in the declaration, was, "that if the said Thomas Watts did and should well and faithfully collect and receive the watch-rate, and the several taxes, duties, and assessments which he then was or should or might thereafter be appointed or employed to collect or receive by the plaintiff, as such deputy as aforesaid, and also did and should well and truly pay or cause to be paid the same watch-rate, taxes, duties, and assessments, and every part thereof, respectively, unto the plaintiff, his executors or administrators, or unto his or their order, upon demand, from time to time, when and as soon and as often as the same, or any part thereof respectively, should be received by him the said Thomas Watts, deducting only the customary allowance or poundage for the collection thereof; and also did and should, from time to time and at all times, so long and as often as the said Thomas Watts should continue to be appointed or employed as collector or receiver as aforesaid, diligently and faithfully employ and apply himself in and about the collecting and receiving of the said watch-rates, and all other duties and assessments; and, also, if he, the said Thomas Watts, his executors or administrators, should, at any time when thereunto required by the said plaintiff, his executors or administrators, render and give unto him or them a full, true, distinct, and perfect account, in writing, of such his employment, collection, and receipt, and deliver up to him or them all the books and accounts intrusted to his care as collector or receiver, or as beadle as aforesaid; and did and should, in all respects, well and faithfully demean and conduct himself in the execution of his duty or appointment or employment as aforesaid, then the bond should be void and of no effect, otherwise the same should be and remain in full force and virtue." Breach, that although Thomas Watts, after the making of the bond and condition, and before the commencement of that suit, by virtue of his said office of beadle as aforesaid, did receive and collect the watch-rate, and several other duties, taxes, and assessments, which he was appointed and employed to collect and receive by the said plaintiff, as such beadle as aforesaid, to the amount of 100*l.*, after deducting the customary allowance or poundage for the collection thereof; and although Thomas Watts afterwards was demanded and required to pay over to the said plaintiff, according to the condition of the bond, the said sum of 100*l.*, so collected and received by him, he refused to do so.

On a writ of inquiry, executed before DALLAS, C. J., at the London sittings after Trinity term last, with a view of proving the amount of the sums received by Watts, certain books were produced, which had been delivered to him from his predecessor in the office of collector or receiver of the watch-rates, &c., and which, on his decease, were handed over to his successor. These books contained the names of the parishioners charged with the watch-rates, and opposite to the name of each parishioner was the sum at which he was assessed. Many

of the names were ticked off; that is, a mark was made at the side of them, by which mark Watts indicated that he had received the sum assessed to those names. Receipts, signed Watts, for moneys paid to him in his official capacity, were also produced. The counsel for the defendant having objected to the admission of these books or receipts as evidence against the defendant, damages to the amount of the penalty of the bond were assessed for the plaintiff, with leave to the defendant to reduce them, in case the Court should be of opinion that the evidence ought to have been rejected.

Pell, Serjt., accordingly, moved to this effect on a former day, contending, that though the entries in the books, or the receipts, might have been good evidence against Watts, they were not evidence against third persons. First, as being evidence not on oath; secondly, as not being the best evidence, since the parties who paid the money might themselves have been called. He said such evidence had been rejected in *Cutler v. Newlin*, Manning's Digest, Evid. Privies.

Vaughan and *Peake*, Serjts., now showed cause against the rule. This would have been evidence against Watts, and, if so, it is equally evidence against the defendant, for admissions by one of several obligors are evidence against a co-obligor. They are privies in interest, and where several have entered into a contract, the declarations of one will bind the other. *Whitcomb v. Whitting*, Dougl. 652, *Brockman's case*, Gilbert, Evid. 47, 6th ed., *Vicary's case*, Gilbert, Evid. 51, 6th ed., *Grant v. Jackson*, Peake, N. P. C. 203, *Wood v. Braddick*, 1 Taunt. 104. On the same principle admissions by rated inhabitants of a parish have been admitted as evidence touching the settlement of a pauper. *Rex v. Hardwick*, 11 East, 578, and *Rex v. Whitley Lower*, 1 M. & S. 636. Then Watts, if alive, might, in this action, have been called to prove what he had received, and the entries of a party deceased, if made against his own interest, are admissible where he might have been called if alive. *Higham v. Ridgway*, 10 East, 109, *Harrison v. Blades*, Phillips, 269, 3 Campb. 457, *Barry v. Bebbington*, 4 T. R. 514, *Doe, Lessee of Reece, v. Robson*, 15 East, 32. In *Lord Torrington's case*, 1 Salk. 285, the entries of a person living were admitted, on the ground that they constituted part of the *res gesta*; and so do the entries and receipts in the present case. In an action against the sheriff for an escape, the declarations of the original defendant may be given in evidence. [RICHARDSON, J. That is on the ground, that the sheriff, by his conduct, substitutes himself for the original defendant.] In *Perchard v. Tindall*, 1 Esp. 394, evidence of this description was admitted, and it is impossible that any inconvenience could result from such a course, inasmuch as the receiver would never make entries against his own interest. *Peake* also cited *Brett v. Levett*, 13 East, 213.

Pell, in support of his rule. The cases of partners and privies in interest do not apply, inasmuch as the defendant had no interest whatever in common with Watts; and cases of sureties are cases *strictissimi juris*, favoured in law. Entries of deceased persons have been admitted to prove, not the truth of the entries themselves, but some other fact

with which they were connected. The point now in dispute did not come distinctly before Lord ELLENBOROUGH in *Harrison v. Blades*; and *Lord Torrington's case* turned on the course of trade. In no case has the receipt of the principal been admitted as evidence against his surety when the party who paid the money could be called, unless where the agent had authority to represent his principal. The rules of evidence are the land-marks of property and the safeguards of life, both of which might be endangered, if evidence such as that which is contended for in the present case, were admitted against third persons.

Cur. adv. vult.

DALLAS, C. J., now delivered judgment. This case has been much argued at the bar, and much on topics which seem to have no very close application to the subject. The Court, at least, will decide on a very narrow ground. It is a principle clearly established, that whatever a party says, either in civil or criminal cases, is evidence against himself; but in a variety of instances it is not evidence against others. The entries in these books are in the nature of a declaration of the party; but the present proceeding is not against the party, but against his surety; and therefore the question will be, first, whether the book in which the principal charged himself, be or be not evidence against his surety; and then, whether the receipts of the principal for money paid to him in the execution of his office, be also evidence against the surety. And here it is necessary to advert to the situation of the parties. The defendant was surety for one who was dead at the time the action was brought, and who had been collector of the watch-rates and other taxes in the parish in which he lived. The condition of the bond on which the defendant is sued, is, that 'Thomas Watts should diligently and faithfully employ himself about the collecting and receiving the watch-rate and all other duties and assessments, and should, at any time when required by the plaintiff, render a perfect account in writing of his collection and receipt, and should deliver up all the books and accounts intrusted to his care as collector or receiver. It is clear, therefore, that the defendant's obligation is, among other things, for the due delivery of these books, which are referred to in the condition of the bond, as public books, (it being there stated that they were intrusted to him, and are to be delivered over to his successor) and thereby become evidence against him. On this ground, we think that the marks made by Watts ticking off the persons assessed, are, as an entry in a public book, evidence against the surety in this case.

On the other point in the case, whether the receipts signed by the principal are evidence against the surety, more doubt has existed. Not that I agree in the assertion made at the bar, that in no case can the receipt of a principal be evidence against his surety. There might be an authority actually given which would justify the reception of such evidence; there might be an authority implied from the circumstances of the case. In *Biggs v. Lawrence*, 3 T. R. 454, the receipt of an agent was admitted as evidence against his principal. Lord KENYON, it is said, by counsel, in *Bauerman v. Radenius*, 7 T. R. 665, after

wards ruled to the contrary. In many cases there may be a doubt whether an agent has or has not power to bind his principal; but I do not accede to the doctrine, that in no case is the receipt of the agent evidence. It is sufficient that there is not enough in the circumstances of the present case to admit the receipts of Watts against his surety. But as we decide that the books are evidence, this becomes less material.

Judgment for the plaintiff.

ORR v. MORICE and Others.—p. 139.

The defendants, assignees of a bankrupt, produced, under a notice from the plaintiff (in an action for use and occupation,) the deed of assignment of the bankrupt's effects: *Held*, that the deed was admissible in evidence, though not proved by the attesting witness, it having been shown that the defendants occupied under the deed.

ASSUMPSIT for use and occupation. The defendants were the assignees of a bankrupt, and at the trial before DALLAS, C. J., (Middlesex sittings after Trinity term last,) it was proved, that one of them had continued for some time after the bankruptcy to occupy a counting house, which, up to his bankruptcy, had been occupied by the bankrupt.

The defendants, under a notice from the plaintiff, produced the deed of assignment, and the plaintiff, omitting to prove its execution by the attesting witness, it was contended, that the deed was not admissible in evidence.

DALLAS, C. J., held, that the assignment so produced was admissible, as coming out of the possession of the defendants, who had taken a beneficial interest under it. A verdict having been found for the plaintiff,

Hullock, Serjt., on a former day, obtained a rule *nisi* to set aside this verdict, and enter a nonsuit, on the ground, that the plaintiff ought to have proved the deed by calling the attesting witness.

Pell, Serjt., who showed cause against the rule, cited *Pearce v. Hooper*, 3 Taunt. 60, and contended, that the defendants taking a beneficial interest under a deed in their own custody, must be thereby deemed to admit its due execution.

Hullock, Serjt., in support of his rule, referred to *Gordon v. Secretan*, 8 East, 548, *Johnson v. Lewellin*, 6 Esp. 101, and *Wetherston v. Edgington*, 2 Campb. 94, as having overruled *Rex v. Middlezoy*, 2 T. R. 41, where it was holden, that a deed coming out of the hands of the opposite party, after notice to produce it, must *prima facie* be taken to be duly executed, and must be received in evidence without proof of the execution; and he distinguished the present case from *Pearce v. Hooper*, inasmuch as the defendants did not take an interest for their own benefit. He urged, that the Court should not go further in qualifying the strict rule as to the proof of deeds; a rule established on sound principles, and productive of no surprise or inconvenience, inasmuch as

the party calling for the production of a deed, might, under a rule of court or a judge's order, obtain a sight of it beforehand, and learn the name of the subscribing witness in time enough to produce him.*

DALLAS, C. J. The cases on this subject have been contradictory; the earlier cases laying down a rule, which, on first consideration I should have thought correct, namely, that when an adverse party, who has a deed in his custody, produces it on notice, it shall be deemed to be duly executed, and the party calling for it, shall not be required to prove the execution by calling an attesting witness. That rule indeed proceeded on the ground, (which subsequent practice has in some degree removed,) that the party calling for the deed could not be supposed to know the name of the attesting witness. Then came the case of *Gordon v. Secretan*, by which that doctrine was expressly overruled, and wherein the party calling for the deed, was held bound to prove its execution, as in every other case. After that, followed the case of *Pearce v. Hooper*, in which it was decided, that where an adverse party produces, upon notice to do so, an instrument under which he claims a beneficial estate, the party calling for the deed shall not be compelled to prove its execution by the testimony of the attesting witness: and in another case at *nisi prius*, in which the circumstances were of the same nature, I remember having ruled to the same effect. The question then will be, whether, in the present instance, the assignees did claim a beneficial interest under the instrument which they were called on to produce? As to that, it appeared that the bankrupt had claimed the premises in question, that his assignees had entered, and had occupied them for some time. This brings the case within the rule laid down in *Pearce v. Hooper*, and I think it was not incumbent on the plaintiff to call the attesting witness of the deed produced by the defendants under these circumstances.

PARK, J. Whether the rule in *Rex v. Middlezoy* was right or wrong, I do not say; but the rule laid down by Lord KENYON, general and unqualified as it was, I know produced great inconvenience, and I have myself frequently seen plaintiffs most cruelly nonsuited under the operation of that rule. Perhaps great inconvenience might ensue from taking the rule generally, either way; but it has been properly restricted by the decision in *Pearce v. Hooper*, and it is no longer necessary, where the party producing the deed or notice, takes a beneficial interest under it, that the party calling for the deed should bring forward the attesting witness. I think it sufficiently clear in the present instance, that the defendants took such an interest under the deed, and that, therefore, it was not necessary to call the attesting witness.

BURROUGH, J. I remember a case prior to *Rex v. Middlezoy*, in which the decision is to the same effect, and I think that affords the soundest rule; for under the other rule, the party who has the deed, frequently defeats his opponent by producing it; a hardship which presses heavily on the party who calls for the deed. In this case, however, there can be no question, because the assignees take an interest on the face of the deed, and I think it was very properly admitted

* See the note to *Wetherston v. Edgington* 2 Campb. 95.

RICHARDSON, J. It cannot be understood now, that a party who produces a deed or notice, is therefore to be held as admitting it to be conclusive against him. In many cases, he may contend the very contrary; as in the case of *Gordon v. Secretan*; or in the case of an heir who disputes a deed or will, or where a deed or will is fraudulent. But, on the other hand, there are cases like *Pearce v. Hooper*, where a party who produces a deed must be taken to admit its due execution, as where he takes a beneficial interest under it. This case is not so strong as that of *Pearce v. Hooper*, but is sufficiently so to justify the admission of the deed without calling the attesting witness. The defendants are assignees of a bankrupt; they occupy a counting-house which had been rented by the bankrupt; and, upon notice to do so, they produce at the trial, in an action for use and occupation, the deed by which the bankrupt's property is assigned to them. This is an instrument under which they claim an interest, and their case falls within the rule which has been laid down touching the production of deeds, under which the party producing them takes a beneficial interest.

Rule discharged.

STEVENS and Another, Assignees of MITCHELL, a Bankrupt, v. ROTHWELL and Another, Sheriff of MIDDLESEX.—p. 143.

A sheriff, who levies under a *levari facias* for a crown debt, is not entitled to poundage under the statute 29 Eliz. c. 4, and, consequently, an action against him under that act, for extortion in such a case, is misconceived.

THIS was an action on the 29th of Eliz. c. 4, against the sheriff of Middlesex, for extortion. At the trial before DALLAS, C. J. (Middlesex sittings after Trinity term, 1821), it appeared that the sheriff's officers (who were employed to levy, under a *levari facias*, a debt due from Mitchell to the crown) had, at his request, allowed time for dividing his effects into lots, in order that they might sell to greater advantage: for the expenses of a man employed to keep possession during the time so allowed, a small remuneration had been demanded and received.

It was objected among other things at the trial, first, that this being a levy for a crown debt, the sheriff was not entitled to poundage under 29 Eliz. c. 4, and that an action for extortion did not lie on that statute, but that the party's remedy, if any, was on the 3 Geo. 1, c. 15; secondly, that the remuneration, having been received for something done out of the course of official duty, was not an extortion within the meaning of either statute. A verdict having been found for the plaintiffs, with liberty for the defendants to move to set it aside and enter a nonsuit, and

Vaughan, Serjt., on a former day having obtained a rule *nisi* to this effect, on the ground above stated,

Pell, Serjt., now showed cause against the rule, arguing from the words of the statute of Elizabeth, that the sheriff was entitled to pound-

age on a *levari* for a crown debt, and consequently liable to this action, the statute giving poundage on all writs of extent or execution, and a *levari facias* being in the nature of an extent, and at all events an execution. He cited Jones's Index to the Exchequer Records, title *Sheriff*, to show, that, between the time of the passing of the statute of Elizabeth and that of George 1st, it had always been usual for the Court of Exchequer to issue orders for poundage on these writs; from whence he inferred, that the statute of George 1st was merely cumulative: he also observed, that in *Deacon v. Morris*, 2 B. & A. 393, which was an action on the statute of Elizabeth, and in which there had also been a levy for a crown debt under a *levari*, the present objection was not started by the Court or counsel.

Vaughan, contra, was stopped by the Court.

DALLAS, C. J. It is not necessary for us to decide, whether or no the facts proved in this case, amount to extortion on the part of the sheriff. Generally speaking, extortion is the taking by colour of office more than the officer is entitled to, or the party bound to pay; in other words, taking more than ought to be charged for the performance of the official duty. Here, the facts are widely different; it was no part of the officer's duty to bestow his time in dividing into lots the bankrupt's effects for the convenience of the bankrupt. If it were necessary, therefore, to give an opinion, whether or no this was extortion, I should think it was not; but it being unnecessary, I give no opinion on that part of the case. The ground of my decision is shortly this; the statute of Elizabeth, on which this action is framed, applies only to cases between party and party. Before and after that statute passed, orders were issued from the exchequer, from time to time, which regulated what the sheriff should be permitted to claim, clearly showing, that he was not entitled to claim anything under the statute of Elizabeth, for, if he had been so entitled, there would have been no necessity for issuing the orders in question. Then came the statute of 3 Geo. 1, which is applicable to cases where the debt is due to the crown, and gives the sheriff poundage in those cases, in which he was not before entitled to it, or, at least, very doubtfully. I am therefore of opinion, that at all events, the proceeding ought to have been on the latter statute, and not on the former.

PARK, J. I am of the same opinion. I have not very fully considered, whether or no the facts of this case amount to extortion, though I incline to think not; but it is not necessary for me to give an opinion on that point, because it is clear, that the sheriff was not entitled to poundage, as a matter of right on execution for crown debts, previously to the statute of Geo. 1st. The statute of Elizabeth applied only to cases between party and party; and therefore, when the crown debt was large, the sheriff applied to the Court for relief, and the Court made orders from time to time, which would never have been done if the sheriff had been entitled under the statute of Elizabeth. That is a strong argument in support of the defendant's case. Then came the statute of Geo. 1st, which mentions and distinguishes the different writs: and even by that statute, the poundage is not to be taken out of

the effects of the party, but out of the crown debt: the statute then gives a remedy to the party aggrieved; not by action of debt as under the statute of Elizabeth, but by a compulsory process from the Court of Exchequer. In *Deacon v. Morris*, the only question before the Court was, as to the treble costs, and the point now in dispute was not even adverted to. I am therefore of opinion, that in this case a non-suit must be entered.

BURROUGH, J. I give no opinion whether this action would have been maintainable, even if the case were within the statute of Elizabeth; though, if it had been necessary, I should probably have holden, that this was not extortion under the circumstances. As to the other points, I agree in the construction put by the Court on the statute of Geo. 1st. It appears to demonstration, that the sheriff had no right to poundage for a *levari* at the suit of the crown, under the statute of Elizabeth; he acquired a right to it under the statute of Geo. 1st, and parties aggrieved must now pursue that statute.

RICHARDSON, J. This action is misconceived on the statute of Elizabeth, which does not apply to crown debts, but only to cases between party and party. Prior to the statute of Geo. 1st, the sheriff was entitled to nothing, except under orders from the Court.

The language of the Court in *Peacock v. Harris*, Salk. 331, shows that the Judges thought the statute of Elizabeth applied only to cases between party and party. I think, therefore, the defendant is entitled to a

Rule absolute.

READ v. BONHAM.—p. 147.

Insurance for 8000*l.* on ship *Vittoria*, and 4000*l.* on freight, at and from London to the East Indies and back. The ship sailed seaworthy from Calcutta on her voyage home, when, in addition to some damage which she sustained in the river Hooghly, she encountered two storms at sea, by which she was so shattered as to render it necessary for the captain to put back; and he returned to Calcutta on the 30th of August, 1820. On his arrival at Calcutta, he gave notice of abandonment to the agents for Lloyds, resident there, and requested that their surveyor might be present at the surveys of the ship. The agents said they had no authority to accept the abandonment; but their surveyor attended the surveys, when it was found that the ship was so seriously damaged that the expense of repairing her would be nearly 5000*l.* The agents refused to undertake the repairs; and the captain, having in vain attempted to borrow money for that purpose by hypothecation of ship, sold the ship for 1200*l.*, conceiving that to be the best course for all parties. On the 25th of April, 1821, the captain arrived in London, where the owner resided; and, on the 3d of May, the ship's papers were delivered. On the 5th of May, the ship's broker abandoned to the underwriters.

In an action on the policy on ship, the jury having found a verdict for the plaintiff as for a total loss, and that the captain had sold the ship for a justifiable cause, the Court (*dissentiente* RICHARDSON, J.) refused to grant a new trial, which was moved for, on the ground that the ship ought not to have been sold, and that notice of abandonment had not been given in due time.

ASSUMPSIT on a policy of insurance on the ship *Vittoria*, at and from London to the East Indies and back. The ship was insured at 8000*l.*, and the freight to the amount of 4000*l.* more. At the trial before

DALLAS, C. J., at the London sittings after Trinity term last, it appeared that the ship having sailed from England staunch and seaworthy (A. I. in Lloyd's list,) arrived at Calcutta, took on board a cargo for England, and having been overhauled and thoroughly repaired, sailed from Calcutta on her homeward voyage. In proceeding down the river Hooghly she sustained damage, by coming in contact with a brig at anchor: but having been refitted, she proceeded on her voyage, where, being already a little leaky, in consequence (as the captain thought) of the accident with the brig, she soon encountered two storms, which injured her to such a degree as to render it necessary for the captain to put back; and on the 30th August, 1820, she returned to Calcutta in a shattered state. On the day of her arrival, the captain entered a protest, and wrote the following letter to the resident agents for the committee at Lloyd's: "Understanding you have been appointed agents for Lloyds, where the ship Vittoria is insured, I beg leave to announce to you her return to this port in consequence of stress of weather, by which she has been rendered very leaky, and almost all her rigging and sails have been carried away. It appears to me that her damage is considerable, and it is, therefore, my intention to abandon. I have entered a protest, and shall send you a copy thereof as soon as executed; in the meantime it is my intention to put her into Messrs. Richardson and Co.'s dock, for the purpose of holding a survey on her, at which you will, I presume, send some person to attend. I shall keep you advised of proceedings." This letter the agents answered by writing to the captain, that they approved his intention to put the Vittoria into dock, for the purpose of a minute survey being instituted into her present condition, and that they would, if required, direct the surveyor to attend in his official capacity. Different surveys were had, which detailed the injuries sustained by the ship, at all of which but one, the surveyor appointed by Lloyd's agents attended. By these surveys it clearly appeared that the ship was greatly shattered, and that it would cost at least 16,000 rupees to repair her. On the 1st September, 1820, the day of the last survey, the captain wrote to Lloyd's agents, informing them of that survey; that the total expense of repairing ship and rigging would amount to 34,000 rupees; that it would be highly imprudent to attempt any repair; that he thought it for the benefit of those concerned, that the ship should be sold by public auction, and repeating his wish to abandon. The agents replied by letter, that their instructions from the committee at Lloyd's were decidedly against any interference on their parts; that in no case was the agent to accept an abandonment of either ship or goods as the representative of the underwriters; but to leave the parties who abandoned to act on their own responsibility. The captain then wrote to the agents, asking them if they would, as agents, give orders for the ship being repaired. The agents, having written to say, that they had no authority to give such direction, the captain sought advice on the subject by writing a full statement of the case to three of the most respectable houses in Calcutta, who severally declined to advise him thereon. On the 23d of September, he applied to five several houses in Calcutta to advance

money upon hypothecation of the ship. Four of the houses declined to make any advance, and the fifth also declined, unless the captain would hand over the freight, bills and policies of insurance.

The ship was then advertised and sold by auction early in October, for 11,000 rupees. The captain said at the trial, that he had no money to go on with the repairs; that if the ship had been his own he should have pursued the same course; and that to have repaired her, in the shattered state in which she then was, would have been an act of madness. The captain arrived in London where the plaintiff resided, on the 25th of April, 1821. The ship's papers were received by the plaintiff on the 3d of May, and on the 5th, the broker, by word of mouth, abandoned the ship to the underwriters. DALLAS, C. J., was of opinion, that there was sufficient notice of the abandonment. The jury, under the direction of his Lordship, found a verdict for the plaintiff as for a total loss, and that there was a justifiable cause for selling the ship.

The Solicitor-General, on a former day, obtained a rule nisi to set aside this verdict and have a new trial, on the ground that the notice of abandonment was not given in time; *Hunt v. Royal Exchange*, 5 M. & S. 47; *Mellish v. Andrews*, 15 East, 13; That abandonment was necessary under the circumstances; *Hodgson v. Blackiston*, Park's Insurance, 281, note; *Martin v. Crockatt*, 14 East, 465, and *Allwood v. Henckell*, Park's Insurance, 280, 7th ed.; and that the captain was not justified in selling the ship, *Reid v. Darby*, 10 East, 143; *Idle v. The Royal Exchange Assurance*, 3 B. Moore, 115, S. C. 8 Taunt., that not being the course most beneficial to all concerned, especially to the underwriters on freight.

Lens and *Pell*, Serjts., now showed cause against the rule. Though it might, perhaps, have been more advantageous for the underwriters on freight if the ship had been repaired, at whatever expense, so as to pursue her voyage, yet that could only have been done at a ruinous loss to all others concerned; and the captain was entitled to exercise a discretion on the subject. *Idle v. Royal Exchange Assurance*, *Hayman v. Molton*, 5 Esp. N. P. C. 65. Here, however, it was out of his power to exercise any discretion, as he failed in his attempt to obtain money to pay for the repairs. The abandonment made to the agent of Lloyd's in India, ought to be deemed sufficient; for, though he had no authority to accept the abandonment, it was his duty to communicate it to his principals; and there was no way in which the plaintiff could expect to convey the notice to them more speedily than through the hands of their own agent. But the abandonment in England, being made within two days after the ship's papers arrived (the only documents which could give the plaintiff accurate information as to the extent of his loss), was made within a reasonable time, which is all the cases require. In *Hunt v. Royal Exchange*, 5 M. & S. 47, the delay was five days. In *Mellish v. Andrews*, 15 East, 13, from the 8th to the 17th of the month. So, in *Gernon v. Royal Exchange*, 2 Marsh. 88, there was manifest delay. No case decides that the notice must be given on the very day the party receives the communication of his loss. But it may be doubtful whether, where a ship is sold, it be necessary

to give notice of abandonment at all. In *Hodgson v. Blackiston*, it was holden necessary: but the contrary was ruled in *Mullett v. Shedden*, 13 East, 304. [RICHARDSON, J. There the cargo was sold adversely; in *Hodgson v. Blackiston*, it was sold for the party concerned. DALLAS, C. J. In *Allwood v. Henckell*, Lord KENYON inclined to think the abandonment necessary; and it may be taken for granted here.]

Taddy, in support of the rule. A captain can only be permitted to sell in cases of extreme necessity, such as a moral or physical impossibility of repairing, and no such necessity existed here; the ship was staunch when she sailed, and money might have been raised by hypothecation of the cargo.* It was long doubted whether a captain could lawfully sell under any circumstances. *Reid v. Darby*. In *Idle v. Royal Exchange*, this Court held there was such an extreme necessity; but the Court of King's Bench, doubting whether that had been made out, ordered a *venire de novo*.† At all events, a captain cannot be justified in selling the ship, except in a case in which he would have sold her if she had been uninsured. *Green v. Royal Exchange Assurance*, 6 Taunt. 72. In the present case, the captain would never have sold her if she had been uninsured: for if she had been repaired at an expense of 5000*l.*, and had pursued her voyage, 7000*l.* would have remained out of the estimated value of 12,000*l.*: whereas, under the sale, only 1200*l.* remained: then the abandonment was not made in time. What passed between the captain and the agents for Lloyd's in India, must be put out of the question; the agents having no authority to act in the business: the captain having arrived in London (the place of the plaintiff's residence) on the 25th of April, it cannot be believed that he delayed waiting on his owner, after such a disaster, till the 3d of May; if he did not so delay, the abandonment was too late according to *Mellish v. Andrews*, and *Hunt v. Royal Exchange*. As to the ship's papers not having come to hand before that day, they were not necessary to enable the owner to give notice of abandonment, as they would not inform him of the extent of his loss, a loss which it must be presumed he had heard of by letter from his captain in the long interval between September and April.

DALLAS, C. J. The jury have found, in this case, that the captain had a justifiable cause for selling the ship, and they found this on all the facts in evidence in the cause: to those it becomes, therefore, necessary, in the outset, to refer; and the more so, because an endeavour has been made, though I do not say improperly, to impeach the con-

* Case of the Gratitude, 3 Rob. Adm. Rep. 340. See Park's Insurance, 618, note, 7th ed.

† *Bosanquet*, Serjt., *amicus curiæ*, informed the court that when the case of *Idle v. The Royal Exchange*, in error, came on for argument in K. B., that court called on *Tindal*, who was for the defendants in error, to point out how it appeared by the special verdict that the sale was necessary; and, after hearing some observations from him to show that the necessity was to be inferred from the finding of the jury, expressed a clear opinion that the necessity did not appear, and awarded a *venire de novo* for the purpose of trying whether it existed or not. *BATLEY, J.*, said that the question, whether the circumstances amounted to an abandonment, might also be left open.

The case having been settled, never came to trial on the *venire de novo*.

duct of the master, as if he had acted for his own benefit, or for the benefit of his owners instead of acting for the benefit of all concerned. The ship having been seriously damaged in a storm, what was the conduct of the captain on his return to Calcutta? It is admitted that the underwriters have agents at Calcutta: not indeed for the purpose of accepting abandonments, but for the purpose of transmitting information: however, they have agents there, and what could the captain do more, as a man of justice, honour, and integrity, than give notice of abandonment to those agents? He could not abandon to the underwriters, for they were not on the spot. If their agents were not authorised to accept abandonments, they might at least have transmitted intelligence of them; and there was no other person to whom abandonment could be made. What is the next step? The captain submits the ship to a regular survey by competent persons, and, not content with his former notice to the agents, gives notice also of the survey, and invites the agents to send some one to attend. They return for answer that they will, if required, send their surveyor to attend in his official capacity. Accordingly one of the surveyors who signed the report, which was in evidence in the cause, and proved the shattered state of the ship, was the surveyor appointed by Lloyd's agents. At one time the captain was inclined to repair the ship, if it had been possible; and that is clear from the attempt which he made to borrow money for the purpose; an attempt which failed. The captain swears that he had not money to go on with the repairs, and that, in the state in which the ship was, it would have been madness to attempt to repair her. Under these circumstances the captain sells the ship, after a public advertisement; the agents of Lloyd being on the spot, no protest being made against the validity of the sale, nor any thing communicated by them, to impeach its validity: and the jury came to the conclusion that the captain was perfectly warranted in all he did. The direction of Lord MANSFIELD to the jury, at the trial of the cause of *Milles v. Fletcher*, Dougl. 219, was, "that if they were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss." Afterwards, upon the motion for a new trial, Lord MANSFIELD said, "The captain had no express order; but he had an implied authority, from both sides, to do what was fit and right to be done;—and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this is within his contract of indemnity." Finally, he says, "I left it to the jury to determine, whether what the captain had done was for the benefit of the concerned. If they had found 'that it was,' where would have been the question of law?" So was it left to the jury in this case; and they have found that what was done, was done in the exercise of an honest discretion, and for the benefit of all concerned: and I see no reason, (the jury having been special, and peculiarly competent to judge of such subjects,) to overturn the conclusion to which they have come.

The only remaining question is, whether notice of abandonment was given in due time; and it is to be considered, whether, under the

circumstances, the rule as to notice is to be rigidly pressed. Notice must be given in reasonable time; the Court being the judge of what is reasonable; and cases have been argued, in which they have decided what is and what is not reasonable. But what is the reasonable time within which notice should be given, must, in every case, depend on the circumstances of that individual case. Here there is no evidence of any communication to the owner, of the circumstances of the loss, previously to the arrival of the captain; and the notice having been given on the day but one after the owner was furnished with the full means of knowing all the facts of the case, must be deemed sufficient.

PARK, J. The verdict was clearly right on the first point; for a case of stronger necessity to justify the sale of a ship has seldom been made out. The captain could not procure money for repairs, and it was not to be expected that he should let the ship rot. Did he then act as a fair man ought? he went to the very person whom he thought authorised to act in the business, (that person, indeed, denied any authority to accept an abandonment;) but he was called in to the survey, and the ship was sold, as the most advisable way of disposing of her when the result of that survey was known.

Then comes the question, whether the notice of abandonment was given in time: the cases say it should be given speedily, or as soon as may be, that is, within a reasonable time; and the party is not allowed to wait and see which course may turn out most to his benefit. The jury, under the direction of his Lordship, have in effect found that more than a reasonable time was not taken in the present instance, and I think they have found correctly. We are not to assume, without proof, that the captain, on his arrival in London, ran with all speed to his owner, and this being a case in which no wrong has been done, ought not to be defeated on light and ill-sustained objections. I am therefore of opinion that the verdict ought not to be disturbed.

BURROUGH, J. Where the evidence is all on one side, and the transaction has been perfectly fair, I think the Court has no right to disturb the verdict of the jury. Who can doubt that the jury were correct in this instance, and that the captain was warranted in all he did? As to the notice of abandonment given at Calcutta, I have no conception that a person who is avowedly agent of Lloyd's, can say he has no authority to accept an abandonment; but if he can, he is bound, at all events, to write home and inform his employers of what has passed. Then we have no evidence that the owner knew of his loss before the 3d of May; and no case has gone so far as to say, that not a single day must elapse between knowledge of the loss and notice of abandonment. However, all the cases depend on their own circumstances, and no one of them can lay down a rule for another in this matter. I, therefore, can see no ground for disturbing the verdict.

RICHARDSON, J. I am sorry to say, that I see this case in a different point of view; and I could wish the case to be re-considered on both points. First, as to the necessity of sale; it is certain the assured has no right to sell, except in a case of strong necessity; perhaps he is not confined to a case of physical necessity; but the necessity must be

such as would induce a prudent man, even if uninsured, to sell. What then was the necessity here? The captain contents himself with 1200*l.*, where he had 12,000*l.* at stake; so that if he had been uninsured, the loss must have been 10,800*l.*, with the exception of the amount for which the ship's stores might have sold; whereas the loss would have amounted to no more than 5000*l.*, if the ship had been repaired at that expense, and had completed her voyage. There was, it is true, some difficulty as to raising money, Calcutta being an expensive, though a good place for repairs; and the captain attempted, without success, to borrow on hypothecation of ship, but he never offered to hypothecate the cargo, as he might have done. It appears a strong thing to say, that he would have sold the ship for 1200*l.*, if he had been uninsured. My Lord Chief Justice, and my learned brothers, seem to think that the jury have concluded this point. That the captain acted honourably there can be no doubt; but I should wish it to be again considered, whether he acted for the benefit of all concerned. As to the other point, was the abandonment made in time, according to the facts which are stated to have occurred in London? The captain arrived in London, (where the owner lived,) on the 25th of April. It does not appear that he had any communication with his owner, and that is one of the things I should wish to have submitted to another inquiry; for on his arriving from India, after such a loss, one would have thought he would have seen his owner immediately. It is indeed difficult, in a case where substantial justice has been done, to divest one's self of the feeling which is excited, and to decide a point like this, which seems to conflict with the justice of the case; but I do not think it necessary that the owner should wait for the ship's papers to make abandonment, if the captain communicated with him on arriving in London; and it would be satisfactory to me to know, whether that was so or not.

Rule discharged.

FORSHAW *v.* CHABERT.—p. 158.

- Policy of insurance on ship and goods, at and from Cuba to Liverpool, with liberty, "in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever; and with leave to discharge and take in, at any ports or places she might touch at, without prejudice to that insurance." The insured, after subscription of the policy, inserted in the body of it the words, "with leave to call off Jamaica," to which interpolation all the underwriters assented, without increase of premium, except the defendant, who, being out of the way, was not applied to. The captain sailed from Cuba with eight men, engaged to navigate to Liverpool, and two to Jamaica, being unable at Cuba to procure ten men (the proper complement of the crew) for Liverpool. He then touched at Jamaica, for the sole purpose of landing the two men, and procuring others in their stead: and having accomplished his purpose, was lost on the voyage from Jamaica to Liverpool: *Held*,
 1st. That this was a material alteration of the policy, and rendered it void.
 2nd. That the ship was not, as to her crew, seaworthy for the whole voyage (as she ought to have been) when she sailed from Cuba.
 3d. That the circumstances of her having become seaworthy after her leaving Cuba, and before the loss, did not entitle the plaintiff to recover.

ASSUMPSIT on a policy of insurance on the ship Hope and goods,

"at and from her port or ports of lading in Cuba, to Liverpool," with liberty, "in that voyage, to proceed and sail to, and touch and stay at, any port or places whatsoever; and with leave to discharge and take in at any ports or places she might touch at, without prejudice to that insurance." At the trial before DALLAS, C. J., at the London sittings after last Trinity term, it appeared that subsequently to the subscription of the policy by the different underwriters, the words "with leave to call off Jamaica," had been inserted in the body of it, after the word "Liverpool." All the underwriters, except the defendant, on being applied to, sanctioned this interpolation by writing their initials in the margin of the policy, opposite to the words inserted, and required no additional premium. The defendant being ill and absent from London, was not applied to for this purpose. There were two counts in the declaration, on the policy in question, the first, setting out the policy with the words interpolated, the other, setting it out as it originally stood.

The captain having lost some of his outward bound crew by sickness and desertion, at Cuba, and finding it impossible there, to engage ten men for Liverpool, sailed from Cuba, with a crew composed of eight men engaged for Liverpool, and two for Montego bay in Jamaica. He then proceeded to and touched at Montego bay, for the sole purpose of landing the two men, (who refused to proceed further,) and of procuring others to supply their place. Having effected both these objects, he sailed from Montego bay; and the ship, while in the prosecution of her homeward voyage, was lost. It was proved that ten men were a sufficient crew to navigate such a vessel as the *Hope* to England, and that the captain had no fraudulent purpose in touching at Montego bay. Some of the witnesses said the touching at Jamaica increased the risk, and others denied this. It was objected on the part of the defendant, that the alteration in the policy was material, and rendered it void; that the touching at Montego bay was a deviation; and that the ship having sailed from Cuba with an insufficient crew, was not seaworthy when she broke ground; (eight men only being there engaged for England.) But the jury found a verdict for the plaintiff, and that the captain put into Montego bay for a justifiable cause, even though there had been no alteration in the policy.

Taddy, Serjt., on a former day, having obtained a rule *nisi* to set aside this verdict, and instead thereof, to enter a general verdict for the defendant, or to have a new trial, on the grounds of objection above stated.

Hullock, Serjt., now showed cause against the rule. The ship was seaworthy when she left Cuba; ten men being a sufficient crew. The inconvenience would be monstrous if a captain, who cannot obtain a full crew for the whole of his voyage, were precluded from engaging men to forward him a part of the way to a place where he may find others who will proceed with him. It was, therefore, not unseaworthiness, but a supervening necessity that compelled the captain to put into Montego Bay; so that, under the circumstances, this being no deviation, the alteration in the policy becomes immaterial, and the

alteration being in an immaterial point, the policy is not avoided. *Sanderson v. Symonds*, ante, vol. 1, 426. In all the cases wherein an alteration has been holden to avoid the policy, the alteration has been in a material point. *Langhorn v. Cologan*, 4 Taunt. 330. *Fairlie v. Christie*, 7 Taunt. 416. That the touching at Jamaica did not increase the risk, appears, from the other underwriters having sanctioned the alteration, without requiring any additional premium. As to seaworthiness, even if it should be taken that the ship had not a sufficient crew at Cuba, yet, as the loss did not happen till after she had actually obtained a sufficient crew, the underwriters are liable. *Weir v. Aberdeen*, 2 B. & A. 320.

Taddy, in support of his rule. Though the ship, when she sailed from Cuba, was seaworthy to proceed to Montego Bay, she was not seaworthy to proceed to Liverpool, as she ought to have been, to entitle the plaintiff to recover under this policy. *Eden v. Parkison*, Dougl. 732, Park's Insurance, 333. *Forbes v. Wilson*, Park's Insurance, 344, n. Then the touching at Montego Bay, not being occasioned by supervening necessity, but by the captain's omission to procure a proper crew for Liverpool, was a deviation which would discharge the underwriter, unless he had sanctioned the alteration in the policy. If the captain were justified in breaking ground with a crew incomplete for the whole voyage, because he expected to complete his crew at Montego Bay, he would be equally justified in performing the whole voyage by successive engagements from island to island. Whether it turns out eventually possible to do so or not, the captain is bound to sail with a sufficient crew; for the ship must be seaworthy at the time of sailing. *Munro v. Vandam*, Park's Insurance, 383, n. *Watson v. Clark*, 1 Dow. 336. If there be a probability that the assured will not be able to fulfil that condition, which is tacitly annexed to all insurances on ships, he ought to stipulate accordingly. If, therefore, this would have been a deviation, but for the alteration of the policy, the alteration is material, affects the integrity of the instrument, and avoids the policy, as to the defendant. It is true, the ship was not lost till after she had left Jamaica; but whether the alteration in a policy is material, does not depend on the event of the voyage, but on the question, whether the risk is increased at the time the alteration is made. With respect to the ship's having been rendered seaworthy before the loss happened (she having sailed at first, clearly not seaworthy, for Liverpool), the case of *Weir v. Aberdeen* has gone further than any case that preceded it; but that case is distinguishable from the present, for it may be impossible to prove, with certainty, what amount of cargo a ship will safely carry; so, that if a ship is overladen, and the putting back to discharge part of the cargo be held to avoid the policy, captains may be induced to incur the chance of loss, to the disadvantage of the insurers; whereas, the fact of a ship having a sufficient or insufficient crew, is certainly known, and easily proved. *Sanderson v. Symonds* does not press the defendant on the point of alteration, for in that case there were words in the policy equivalent to a permission to trade; while *Fairlie v. Christie* and *Langhorn v. Cologan* (cases which have never been impeached) are in point for the defendant.

DALLAS, C. J. This is an objection to which one feels disposed very reluctantly to yield, for it is an objection against the justice of the case. All the other underwriters were applied to for their consent to the alteration of the policy, and gave that consent; thereby saying for themselves (of all persons the best qualified to form a judgment on the subject) that this alteration occasioned no increase of risk; but unfortunately for the assured, no such application was made, as far as this individual underwriter was concerned; and though, undoubtedly, he would have been applied to if he had been in the way, and probably would have added his initials to the others, yet as he had not done so, he contends he is not bound. However, we must decide on legal grounds, and the question then will be, whether the ship was or was not seaworthy at the time of sailing? Here, it must be observed, that the voyage insured was not a voyage from London to Cuba, and back again from Cuba to London, in other words, a voyage out and home, but a voyage from Cuba to Liverpool, and that the words added to the policy were, "with leave to call off Jamaica," thereby showing, that, in the opinion of the party who added them, liberty to touch at Jamaica, was not within the terms of the original contract. Now it is clear that a ship must be seaworthy at the time when she sails; the assured warrants that, and whatever physical necessities may interpose, he is not allowed to deviate from the strict terms of his warranty. It is clear, too, that what was done by the captain in the present case, was done without fraud, and for the best; he went from Cuba to Montego bay for the sole purpose of procuring more men: was he justified in doing this or not? If he had a sufficient crew for the voyage at Cuba, then this was an increase of risk; he had no right to go circuitously; and the touching at Montego bay would thus be a deviation without necessity. Take it the other way, that he had ten men, a sufficient crew for the voyage, but only eight of them engaged for Liverpool, and two for Montego bay, and that he went to Montego bay to procure two others to supply the places of those who were to leave him; then the ship was not seaworthy when she sailed from Cuba, because the captain ought then to have had ten men for Liverpool, and not eight for Liverpool and two for Montego bay. Either the ship was not seaworthy at the time of sailing, or there has been a deviation. The jury found, that the captain put into Montego bay for a justifiable cause, even though there had been no alteration in the policy; but I go on the circumstance that the ship had not a sufficient crew at the time she sailed, and that the insurance had no inception, because the ship was not seaworthy at the time of sailing. The only way in which the defendant could be liable, he having subscribed the policy without the words "with leave to call off Jamaica," (a policy by which the assured was bound to go direct from Cuba to Liverpool,) would have been by a loss happening in that direct course; so that a question would arise, whether the defendant could be liable in this case on his original contract, even though nothing had been done which could affect that contract; but here there is an alteration in the body of the policy, and, according to some of the witnesses, in a material point of the risk. The words introduced,

therefore, must be taken to increase the risk, and are introduced into the body of the policy, making it in effect a different instrument from what it was when subscribed by the defendant. I need not go into the general doctrine touching the alteration of deeds; it is clear that an alteration in a material part will render an instrument void. In the present case, the alteration, when made, was material, and only became immaterial with reference to subsequent events; the fact being, that the ship was not lost in consequence of touching at Montego bay. But it is material to consider the effect of the alteration at the time when it was made: if it increased the risk then, it was material, and not warranted by any authority. The only case which I shall advert to, is that of *Sanderson v. Symonds*; in that case, the alteration was no alteration of the contract, for the original words of the policy were "at and from Liverpool to her port or ports, place or places of discharge, and loading in Africa and African islands, and *during her stay* there, at and from thence back to Liverpool, or her final port or place of discharge, in the united kingdom," with liberty, on that voyage, "to proceed and sail to, and touch and stay at any ports or places whatsoever and where-soever as above, to *sell, barter, and exchange goods*; and load, unload, and reload goods at any or all of the ports and places she may call at and proceed to." The broker having inserted the words "and trade," after the words "*during her stay*," the Court held, that there was no material alteration, because the instrument as originally drawn, gave the plaintiff leave to trade. In the present case the alteration was material at the time it was made, and what arose afterwards cannot have a retrospect effect. First, then, the ship was not seaworthy at the time of sailing; and, secondly, there has been a material alteration of the policy; and on these grounds the defendant is entitled to have his rule made absolute.

PARK, J. It is with extreme reluctance that I agree in both points in the decision which has been pronounced, because the resistance in this case appears to be most unjust; but whatever feelings may arise on the occasion, we must keep our minds free from prejudice, and decide according to law. I shall begin with the objection touching the alteration of the policy; and, as to that, we have been pressed with the cases already decided on the subject: but the present decision will not trench on the principles laid down by them. The circumstance of *Langhorn v. Cologun* were indeed different from those of the present case, for there the policy was in blank, and the alteration was in a material point. In *Fairlie v. Christie*, we were of opinion that the policy was void, and who could doubt it? a warranty to sail on a particular day was altered from October to December; so that the underwriter had a winter risk put upon him without his consent. But *Sanderson v. Symonds* was a very different case; because there, the insured, who had leave to barter, inserted the words, "*and trade*;" but if he had leave to barter, what difference was there in saying he had leave to trade? Here an alteration has been made on the face of the policy in a material point, and the integrity of the instrument is destroyed; the point, indeed, is indirectly decided in *Hill v. Patten*, 8 East. 373, where the alteration,

though assented to, so far altered the contract, as to render a new stamp necessary, and the contract being void for the want of one, Lord Ellenborough says, in *French v. Patton*, 9 East, 356, "I cannot say that the policy is not so altered as to have lost its original identity,—and I do not think the plaintiff can recur to it again in its original state." LE BLANC, J., says, "Can the Court enforce an agreement after the parties have, upon the very face of the instrument, declared that it is not their agreement?" Now, though both parties did not assent to the alteration in this case, yet there is a material alteration by one, which "is inserted in the body of the original agreement, and makes it speak a different language." *Verba* LE BLANC, J., 9 East, 357. The assured was at liberty to call at any ports or places for a specific purpose, namely, to *discharge*, but not at liberty to touch generally at Montego bay, which might have been done for any purpose inconsistent with the contract of the underwriter. This, therefore, is clearly a material alteration. As to the other point, I am now of opinion, though I was not so when I came into Court, that this vessel must be considered to have been not seaworthy. Was she at the time she sailed seaworthy for her whole voyage? She had ten men, a crew sufficient in number, but only eight of them were engaged for the whole voyage; and if the captain might start with so imperfect a crew, and might supply the deficiency, as he did afterwards, he might equally be entitled to make a voyage from port to port, instead of a voyage direct from Cuba to Liverpool.

BURROUGH, J. The policy is on a voyage from Cuba to Liverpool, with liberty on that voyage "to proceed and sail to, and touch and stay at any ports or places whatsoever, and with leave to discharge and take in, at any ports or places she might touch at, without prejudice to that insurance;" words which can only apply to the voyage from Cuba to Liverpool: but if the words "with leave to call off Jamaica," be inserted, the ship may discharge there also; so that no one can doubt that the alteration in the policy is material. I do not regard what the finding of the jury at nisi prius may be, because the Judges must look at the instrument. The province of the jury is, to deal with matters of fact; but I disclaim the notion that their finding is to bind a Judge in his opinion on matters of law. I am clearly of opinion that there has been a material alteration here, and there is nothing in any decided case which stands in the way of this opinion. In *Sanderson v. Symonds*, the assured having originally leave to barter, could not be said to extend the terms of the contract, by adding the repetition, "and trade."

As to the other point, the ship sailed, it is true, with ten men from Cuba, but eight of them only were engaged for Liverpool: can it be said, then, that she sailed with a proper crew for the whole voyage? The captain was bound to have a proper complement when he started; and, as he failed in this, I am clearly of opinion, that the ship was not seaworthy.

RICHARDSON, J. The first point to be considered is, whether there was in this case any valid contract on which the plaintiff could sue.

and I am bound by the decisions, to be of opinion, that there has been here a material alteration, which has avoided the policy as to the defendant. It is material, too, that this alteration is in the body of the policy, and that the instrument cannot be now read without varying the intention of the party; if such alterations were permitted, a door would be opened to fraud of the most extensive description. The alteration is material in its effect, because it gives the assured leave to call at Jamaica, where ships do not usually call in the course of a voyage from Cuba to Liverpool. That the permission of such an alteration might lead to fraud in many instances, is clear, from the circumstance, that the underwriter's signature is often proved by one who is acquainted with his hand-writing, and not by the broker who managed the contract, and who, perhaps, alone knows what were its original terms; and if this instrument had been so proved, the defendant might have been fixed with a contract different from the contract which he signed. The decision in this case is quite consistent with the decision in *Lunghorn v. Cologan*, where the policy being printed, there were no words to say on what the policy was effected, but such words were afterwards inserted in the blank space; and the Court held, that this was a material alteration in the body of the instrument, which vitiated the policy. In *Fairlie v. Christie*, the alteration was by drawing the pen through certain words expressive of the time of warranty of sailing, which stood in the body of the policy, and inserting in a memorandum in the margin a different time for sailing. Still the court held that the policy was avoided, because, by the alteration, the integrity of the instrument was affected. In *Sanderson v. Symonds*, the alteration was entirely immaterial. *Hill v. Patten*, and *French v. Patton*, are perhaps not in point, because, in those cases, the parties assented to the alteration. I give no opinion on the point, whether, in this instance, the ship was seaworthy at the time of her sailing.

Rule absolute.

CARR v. SMYTHIES.—p. 168.

Plaintiff, an attorney, sued for 21*l.* 7*s.* 11*d.* Defendant, previously to the delivery of declaration, took out a summons to stay proceedings, on payment of 15*l.* and the costs then incurred. Plaintiff refusing to accept the 15*l.*, proceeded by delivering a declaration, but afterwards took the 15*l.* in full satisfaction of his demand, and taxed his costs. The debt having been due to the plaintiff for five years, and the defendant having frequently promised to pay it, the Court refused to order the costs to be re-taxed, so as to allow the defendant the costs incurred between the summons to stay proceedings, and the taking of the money out of court.

THE defendant, on the 3d of April, 1821, previously to the delivery of the declaration in this action, took out a summons to stay proceedings on payment of 15*l.*, and the costs then incurred. The plaintiff, an attorney, sought to recover 21*l.* 7*s.* 11*d.*, and refusing to accept the 15*l.*, proceeded in the action by delivering a declaration; but on the 13th of November, he took the 15*l.* out of court in full satisfaction of

his demand; costs having then been taxed for the plaintiff, up to the time at which he took the money out of court.

Cross, Serjt., on a former day obtained a rule, calling on the plaintiff to show cause, why so much of the common rule as related to the taxing of costs should not be discharged, and why it should not be referred back to the prothonotary to tax the plaintiff's costs up to the 3d of April, and also the defendant's costs incurred in the action since that day, and why the amount of such respective costs, when so taxed, should not be set off the one against the other, and the balance only be allowed as between the parties, and the plaintiff refused such balance, if any, to the defendant's attorney or agent, and why the plaintiff should not pay the defendant his costs occasioned by this application. He cited in favour of his motion, *James v. Raggett*, 2 B. & A. 776; *Zeevin v. Cowell*, 2 Taunt. 203; *Roberts v. Lambert*, 2 Taunt. 283, and *Johnson v. Houlditch*, 1 Burr. 578. (The court referred him to *Burmester v. Hilch*, 13 East, 551.)

Lens, Serjt., in showing cause against the rule, read an affidavit, by which it appeared, that the defendant's debt had been due to the plaintiff for five years, that the defendant had been often requested, and had often promised to pay it. He cited *Gibbon v. Copeman*, 5 Taunt. 840, 1 Marsh. 392, contending that the common practice was never disturbed, except in cases where needless vexation was clearly made out.

Cross, in support of his rule. In *Burmester v. Hilch*, *Johnson v. Holditch* was not cited, and no vexation was proved; whereas the plaintiff in the present case being himself an attorney, and cognisant of the practice of the court, vexation must be inferred from all the circumstances of the case.

DALLAS, C. J. I am of opinion, there is no ground whatever for this application in the result of the facts now before the Court. The way in which the defendant ought to have proceeded, has been stated in one of the cases, *Burmester v. Hilch*. Lord ELLENBOROUGH says: "The defendant might have tendered the sum admitted to be due, before action brought, and then he might have pleaded the tender and paid the money into court." LE BLANC, J., says, "Without a strong case made out to show an intentional vexation, and a view to enhance expense on the part of the plaintiff, there seems to be no ground for the Court to interfere out of the ordinary course." All the cases lead to this principle; not that the Court will presume vexation, but that a strong case must be made out. Here, the debt was due five years ago, and instead of any intention to vex the defendant, there seems rather an inclination to allow him the interest of his debt. It is a case in which, at all events, the Court cannot presume vexation; and, therefore, the rule must be discharged.

PARK, J. We cannot presume vexation, and I can easily conceive there has been none in the present instance. A plaintiff does not usually attend at the Judges' chambers; and though the offer made there was refused, the plaintiff might afterwards, on consideration, think it advisable rather to accept what was paid, than to proceed fur-

ther This matter has been before the Court three times since I have sat in it. On the first occasion, in *Last v. Benton*, 2 Marsh, 478, GIBBS, C. J., adopted the rule laid down by LE BLANC, J., in *Burmester v. Hilch*, and went through all the cases. On the second, in *Jones v. Johnson*, C. P. Easter, 57-Geo. 3, DALLAS, J., gave a judgment to the same effect; which was afterwards adhered to in *Aspinal v. Smith*, C. P. Michaelmas, 59 Geo. 3.

BURROUGH, J. Every one who comes to disturb the order of practice, must show a ground for his request: the practice is clear, and the party must make out a strong case before he can depart from it. Here there is not the least ground for charging the plaintiff with oppression; the defendant ought to have tendered the money before action brought.

RICHARDSON, J., concurring, the rule was

Discharged.

JAMES LESLIE v. RICHARD WILSON, THOMAS REDHOUSE, and JOSEPH JENKING.—p. 171.

Goods conveyed by ship having been spoiled, in consequence of the negligence and unskilfulness of the captain, the freighter sued the owners, (one of whom was the captain,) for damages in an action on the case: *Held*, that the action lay, though the captain had entered into a charter-party, under seal, with the freighter and another, by which he engaged to convey the goods to their destination; it not appearing on the charter-party that the captain was part owner, nor that the freighter knew him to be such when the charter-party was executed.

THIS was an action on the case, in which the plaintiff declared, that at the request of the defendants, he shipped and put on board a vessel of theirs, certain boxes of oranges, to be safely and securely carried and conveyed by them in such vessel, from St. Michaels to London; and that it, therefore, became the duty of the defendants, as owners of such vessel, safely and securely to carry and convey the said goods; and for that purpose to prepare and provide all things necessary in that behalf, and (amongst other things) to procure a proper and skilful master or captain, for the purpose of conveying the goods with safety and security. Yet, that the defendants not regarding their duty as owners, did not, nor would safely and securely carry and convey the goods, nor as owners, procure a proper or skilful master or captain, but therein wholly made default; and, on the contrary, employed an unskilful and improper master or captain, by and through whose misconduct, carelessness and negligence, the arrival of the vessel at her port of destination was delayed, and the goods so laden on board the vessel were damaged, rotten and destroyed.

The second count was more general. The defendants pleaded that they were not guilty.

The cause was tried at Guildhall, before DALLAS, C. J., after Michaelmas term, 1820, when the jury found a verdict for the plaintiff, damages 110*l.*; but his Lordship reserved the point for the opinion of this Court, as to whether the action was maintainable or not; and a rule having been accordingly obtained last Hilary term, to show cause why

this verdict should not be set aside and a nonsuit entered, the Court, after argument by *Lens*, Serjt., for the plaintiff, and *Vaughan* and *Taddy*, Serjts., for the defendants, directed the facts to be turned into a case, in which the question was stated to be whether the action were maintainable.

The case then stated, that the plaintiff was an orange merchant at St. Michaels. That the defendants were owners of the ship *Eliza* and *Jane*; that the plaintiff shipped the oranges under a bill of lading, stating the defendant, *Jenking*, to be master for that voyage. This bill of lading was signed by the defendant, *Jenking*.

The case then stated a charter-party of affreightment between the said *Joseph Jenking*, commander of the vessel, of the one part, and *John Adam* and *James Leslie*, (the plaintiff,) freighters of the said vessel, of the other part, by which the commander agreed with the freighters, that the schooner being tight, staunch and every way properly fitted, victualled and manned, as is usual for vessels in merchants' service, he, the commander, or some other proper person in his stead, should immediately receive on board from the freighters or their agents, the goods in question, and being despatched therewith, on or before the 5th October then next, should with all possible speed set sail to St. Michaels, make a true delivery of the goods, and there receive on board such quantity of fruit as the agents or assigns of the freighters should think fit to load, &c. &c. It is not necessary to state more of the instrument which was under the hands and seals of *Jenking*, *Adam*, and *Leslie*. The case stated the arrival of the ship at St. Michaels, that the cargo of oranges was put on board, and the ship ready for sea; that the plaintiff, *Leslie*, requested *Jenking* to provision the ship, that he neglected to do it; and the facts stated in the case, showed the grossest neglect of duty in him, the master, by means of which the voyage was so delayed, that the vessel, which might have arrived in the month of March, did not arrive till the 5th of May, by reason of which the cargo of oranges was much damaged.

The case was argued again in this term, by *Lens*, Serjt., for the plaintiff, and *Taddy*, Serjt., for the defendants.

Arguments for the plaintiff. This action will lie against the defendants as shipowners, notwithstanding they have entered into a charter-party, jointly with their captain, *Jenking*. No covenant in that charter-party is precisely applicable to the misconduct of which the plaintiff complains; so that he need not dispute the principle, that assumption or case will not lie where there is a remedy of a higher description. But even if there were a covenant in the charter-party applicable to the plaintiff's case, that would not be a bar to his suing in this action on the custom of the realm. The distinction being, that where the cause of action arises out of the contract alone, a lower species of remedy cannot be resorted to, when the plaintiff is entitled to a higher; but where the law gives the party a right, independently of his contract, he may elect which remedy he pleases. Thus a party may have an action on the case in the nature of waste, against one who is under covenant not to commit waste, *Kinlyside v. Thornton*, 2 Bl. Rep. 1111. However, in the present instance, the action and the cause of com-

plaint is not against the same parties as were concerned in the charter-party; and that circumstance distinguishes the present case from *Schack v. Anthony*, 1 M. & S. 573, where the master acting as agent for the owners had power to bind them, and render them liable, which power Jenking had not, with respect to the defendants.

Arguments for the defendants. This action would not lie against Jenking alone, and if it would not lie against him alone, neither will it lie against him jointly with the others; for the two leading provisions in the charter-party are applicable to the plaintiff's cause of complaint; and as covenant would have been the proper action on that instrument, an action of a lower degree will not lie. The bill of lading and charter-party are so connected together, that the plaintiff was bound to sue Jenking, if he sued at all, and *Schack v. Anthony* is in point to show, that this action will not lie against him, even though it be framed in tort; for where the tort arises out of a contract, the incidents of an action in tort are the same as those of an action on the contract. *Max v. Roberts*, 12 East, 89. *Weall v. King*, 12 East, 452. In *Kinlyside v. Thornton* there was a tort independent of the contract; and *Jones v. Hill*, 7 Taunt. 392, is an authority to show, that waste will only lie for that which would be waste if there were no stipulation respecting it. To the same effect is *Dyer*, 198 b, pl. 53, Co. Litt. 54 b. And at common law waste only lay against such as did not come in by contract (as tenant in dower, &c.); it is only by statute it has been extended to tenant for life or years. Here there is no wrong independently of the contract.

DALLAS, C. J., now delivered judgment; and, after stating the pleadings and case, as above set forth, proceeded as follows: On these facts we are of opinion that the action was properly brought.

The owners of a ship, for whose benefit she is navigated, are bound by the maritime law to owners of goods, shipped and received on board to be carried, for the due carriage thereof, and are liable for any negligence on the part of themselves or their servants whereby the goods may be damaged.

If, without fraud, and in the due course of the ship's employment, the master makes a charter-party, the ship owners are not thereby divested of liability, but are still liable for the performance of such duties, belonging to them in that character, as are not inconsistent with the stipulations of the charter-party.

And, whether the charter-party be made under the seal of the master, or not, seems to make no difference in this respect; because the ship owners are not charged directly upon the contract of the charter-party, but upon their general liability as principals in the adventure, deriving profit from the ship's employment, for the performance of such duties as belong to them in that character, and are not inconsistent with the charter-party.

A special action on the case, like the present, seems to us to be a proper form of action, for recovery of damages for the breach of such duties.

In this case, a further difficulty has been much pressed upon us,

arising from the circumstance that the master here happens to unite in himself the character also of a part-owner. In the charter-party, however, he is not described as part-owner, but as commander only; nor does it appear, that it was at all known to the plaintiff, or to any other person concerned in the cargo, that he possessed any other character or interest than that of commander or master.

It seems to us, therefore, that this circumstance, thus unknown, cannot be set up, either by him or by the other part-owners, to bar the plaintiff of a right of action, to which he would, otherwise, have been entitled.

In this view of the present case, none of the questions are involved, in which so much difference of opinion has arisen in *Govett v. Radnidge*, 3 East, 62; *Powell v. Layton*, 2 N. R. 365; *Max v. Roberts*, *Weall v. King*, and other cases. For if this action is maintainable, as we think it is, against the defendant Jenking, as well as against the other two defendants, it is unnecessary to consider whether it could have been maintained against the other two defendants alone, if it had not been maintainable against Jenking.

Judgment for the plaintiff

END OF MICHAELMAS TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
Hilary Term,
IN THE
Second and Third Years of the Reign of GEORGE IV., 1822.

DUFF and Others v. BUDD.—p. 177.

Plaintiffs having received an order from a stranger to furnish J. Parker of High Street, Oxford, with goods, and finding upon inquiry that Mr. Parker of the High Street was a tradesman of respectability, forwarded the goods by a carrier, having directed them to J. Parker, High Street, Oxford. On the arrival of the parcel at Oxford, the carrier's porter there, who knew W. Parker of the High Street, (and who was accustomed to deliver parcels at the houses of the consignees,) told him of the arrival of the parcel, no other Parker residing in that street. W. P. said he expected no parcel. A person to whom the porter had before delivered parcels under the name of Parker, called at the defendant's office shortly afterwards, and saying the parcel was his, was allowed to take it on paying the carriage, there being many persons of that name at Oxford. The plaintiffs having thus lost their goods, desired the defendant, by letter, to apprehend the person who had taken them, if he again presented himself, and afterwards said, that they had done with the defendant, if the man who had the parcel were produced. A notice was suspended in a conspicuous part of the defendant's office, limiting his responsibility to 5*l*., except where articles were entered according to their value; and the parcel in question had not been so entered, though worth 89*l*.; but the plaintiff's porter swore he never saw the notice. The plaintiffs having sued the carrier, and the Judge having directed the jury that the carrier's negligence had been such as to render it unnecessary to consider the question as to the notice touching the limited responsibility, and a verdict having been found for the plaintiffs,

The Court refused to grant a new trial, which was moved for on the ground that the question touching the notice ought to have been considered; that the Judge ought to have pointed the attention of the jury to the plaintiff's letter, directing the carrier to apprehend the cheat, and the subsequent conversations thereon; and that the property of the goods had passed out of the plaintiffs.

CASE against a carrier for negligence. At the trial before DALLAS, C. J., London sittings after Michaelmas term, the facts were as follows.

A person unknown to the plaintiffs requested them to send some silks and other goods to Mr. James Parker, of High Street, Oxford; the plaintiffs never having dealt with Parker, made inquiries about him, and finding that Mr. Parker, residing in High Street, Oxford, was a tradesman of great respectability, forwarded the goods in question by the defendant's wagon, having directed the parcel to "Mr. James Parker, High Street, Oxford." The defendant's porter at Oxford, knew William Parker of High Street, at whose house he had delivered parcels, (it being the course of defendant's office to deliver parcels at the house of the consignee;) and on the morning after the arrival of the parcel, went to this Parker, and informed him of the circumstance. Parker said he expected no parcel. Shortly afterwards, a person came to the defendant's office; where, seeing the parcel directed as before mentioned, he claimed it as his own, and on his paying the carriage, the parcel was delivered to him. The porter had before delivered to this person parcels directed for Mr. Parker, Oxford, to be left till called for. Many persons of the name of Parker reside in Oxford, but none of that name was at this time residing in High Street, except Mr. William Parker, the printseller, the person to whom the porter addressed himself as above stated. The plaintiffs having soon discovered that they had been imposed upon, Brooks, one of them, wrote to the defendant, desiring, that should the person who had claimed the parcel in question be found, he might be detained as a swindler; and soon afterwards, in a conversation with a servant of the defendant at his office in Oxford, suggested the same course, saying, he had no doubt the parcel had been delivered to the man who ordered it. In another conversation at the same office, he said that if they could produce to him the man who had the parcel, he had done with the defendant. After this, the book-keeper wrote to Brooks, informing him, that the person respecting whom he inquired, when in Oxford, had been there, and was expected again in a short time; that the defendant could not detain him, as he had not a sufficient charge to make, but suggested, that if Brooks attended, he might procure a warrant to apprehend him. Brooks wrote in answer, that as the parcel was not delivered according to the direction on it, he had no claim on Mr. Parker, but should consider the defendant responsible for the value of the parcel. It appeared that some attempts were made by the book-keeper and others connected with the office to detain the swindler, which attempts failed. The parcel was worth about 89*l.*, and the following notice was in a conspicuous part of the defendant's office in London: "Take notice, that the proprietors of the public carriages, who transact their business at this office, will not be answerable for any packages containing cash, bank notes, bills, jewels, plate or watches, however small the value may be, or for any package of more than five pounds value, if lost or damaged, unless the same is specified when delivered into the office." The value of the plaintiffs' parcel was not specified, but their porter, who could read, swore he never saw the notice. DALLAS, C. J., stated to the jury, that there were two questions for their opinion. The first arising upon the notice. The second, whether there had been gross negligence on the part of the defendant. The learned judge observed that, in one view of the case, it

might not be necessary for the jury to consider the first question : for that, if notice was given, and there had been gross negligence on the part of the defendant, the defendant was liable;* and he directed the jury to consider, whether, under the circumstances, the defendant had been guilty of gross negligence or not; explaining to them, that, if the defendant and his servants had not taken the same care of the property as a prudent man would have taken of his own, he had been guilty of gross negligence.†

The jury 'found a verdict for the plaintiff.

Pell, Serjt., now moved for a new trial, on the ground, first, that the question of notice ought to have been pointed out to the consideration of the jury, inasmuch as conduct which would amount to gross negligence with respect to a parcel of great value, might be reasonable care with respect to a parcel of small value, and the defendants were not warned as they ought to have been, that the plaintiff's parcel was of great value. Secondly, that the learned Judge had not directed the attention of the jury to the letter and conversations, by which one of the plaintiffs directed the defendant to apprehend the person who had taken the goods; and from which it might be collected, that the plaintiffs considered the defendant not responsible for the loss. Thirdly, that the property in the goods was not in the plaintiff but in the consignee. On the first point, *Pell* cited the words of *BAYLEY, J.*, in *Batson v. Donovan*, 4 B. & A. 35. "I left, I believe, these two questions to the jury; first, whether the plaintiffs dealt fairly by the defendants, in not apprising them that the box contained articles of value; and secondly, whether in the case of a parcel of such value as the defendants might fairly expect this to be, there was gross negligence in the defendants;" and urged, that the carrier had a right to suppose the worth of the parcel less than 5*l.*, because it was booked and entered only as a parcel of less value.

DALLAS, C. J. I certainly did state at the trial, that this was a question of importance, and I think so now; but not in the view which my Brother *Pell*, has taken of the case, or, because I feel any difficulty in coming to a decision on it; for at the conclusion of the cause, I did not feel, nor did the special jury, one instant of hesitation. I agree that the case is of importance to the rights of carriers: but it is also important with respect to their obligations, and the rights of the public.

A person calls on the plaintiffs, and orders goods for a respectable tradesman, Mr. Parker, of the High Street, Oxford. The plaintiffs having had no previous dealings with this tradesman, or the party ordering the goods, pause; but having found, on inquiry, that, among the various persons bearing the name of Parker at Oxford, Mr. Parker of the High Street was well known for his respectability, they direct the parcel to him; and the very use of the address, added to the name, was to insure a requisite degree of caution; for the parcel was not directed to J. Parker, Oxford, but to Mr. James Parker, High Street, Oxford.

* See *Garnett v. Willan*, 5 B. & A. 53, and the cases there cited.

† See *Batson v. Donovan*, 4 B. & A. 30, per *BEST, J.*

When the parcel arrived, the carrier very well understood that it was his duty to deliver it as directed; and it had been the course of his office to deliver parcels at the house of the consignees. This Mr. Parker of the High Street had received goods from them at his house: indeed, the porter of the office met Mr. Parker himself, and upon saying he had a parcel, was expressly told by Parker, that he expected none, and knew nothing about it.

I stated to the jury that the duty of carriers might be different under different circumstances. A parcel might be directed to be left till called for; it might be directed to a consignee at a large town, without the name of any street, as was the case in a cause before ABBOTT, J., *Birkett v. Willan*, 2 B. & A. 356, where the parcel was directed to "J. Worthy, Exeter;" and where the carrier having delivered it, on payment of the carriage to one who told him that he had been sent for it by a person whom he did not know, but who was in the street, was holden to be chargeable with the consequences of gross negligence, though the goods were above the value mentioned in the public notice, and although they had not been specially insured and entered. But I told the jury that I would not enter into cases of difficulty, because, here, the parcel was not so directed, but was directed to be delivered at a particular place. So that the jury had only to consider, whether the carrier was guilty of gross negligence in not delivering the parcel at that place; for it is clear, from a case in 4 Price, *Bodenham v. Bennett*, 4 Price, 31, that the carrier is bound, not only safely to convey, but safely to deliver a parcel at the place to which it is directed; per WOOD B., *Bodenham v. Bennett*. Now, after the attention of the porter had been drawn to the circumstances of the case, after Mr. Parker, of High Street, had refused the parcel, and the carrier was required by a person calling himself Parker, whose residence was unknown to him, to deliver the parcel, ought he not to have paused, and to have inquired on what authority the stranger made such a demand? I said, if this was not negligence, there must be an end of carrying for hire; for who would be safe, if a carrier is to deliver to a person, whose residence is unknown to him, a parcel directed to a known place of residence? I therefore thought this a case of gross negligence; but I did not leave it to the jury as a case of gross negligence, without explaining to them what gross negligence was; and I explained it to them in the very words of my Brother BEST, who observed that such an explanation had been omitted by my Brother BAYLEY, in *Batson v. Donovan*.

The jury were clearly of opinion, that the carrier was guilty of gross negligence. I did not minutely direct the attention of the jury to the point touching notice, nor did I detail the evidence as to what passed after the loss, thinking observation on these points unnecessary after proof of gross negligence.

PARK, J. The chief ground of the application for a new trial, is, that evidence of matters which occurred subsequently to the delivery of the parcel, was not distinctly pointed out to the notice of the jury, but I think that this was unnecessary, because whatever the opinion of the plaintiffs might have been as to their right of recovery against A. or B., the real question was, whether the defendant and his servants

had been guilty of gross negligence in the delivery of the parcel; if they were guilty of gross negligence, the opinions of the plaintiffs would not destroy their case. The objection made to the plaintiffs' right of action, on the ground that the property in the goods had passed out of him to the consignee, does not apply to a case bottomed in fraud, in which there has been no sale. I think that the case was properly left to the jury, and that they have properly concluded, that this was a case of gross negligence.

BURROUGH, J. Carriers are constantly endeavouring to narrow their responsibility, and to creep out of their duties; and I am not singular in thinking that their endeavours ought not to be favoured. The question here is, whether there was gross negligence. I think there was, and I am of opinion that the case was properly left to the jury, and that they have given a proper verdict.

RICHARDSON, J. I am satisfied both as to the law and the facts of this case. There was clearly a property in the plaintiffs, entitling them to sue, as they had been imposed on by a gross fraud. With respect to the direction to the jury, there was, I think, gross negligence on the part of the carrier: nor do I think that the letters or conversation of Brooks amounted to a waiver of the right of the plaintiffs to recover the value of the parcel from the defendant.

Then, as to notice of the value of the parcel, such notice may be material in certain cases; as it was in *Batson v. Donovan*, where a great value was contained in a small compass, the parcel consisting of bills, cheques, and notes, to the value of 4072*l.*; but here the parcel was bulky, and not of any extraordinary value: it was directed, not generally, but to a specific place; and the carrier is bound to exercise equal diligence in all cases, and to deliver the parcels intrusted to his care according to direction.

Rule refused.

BOASE *v.* JACKSON.—p. 185.

Demise to A. of a slate pit at B., and stone quarries at C., to hold to A. the slate pit at B., from the 25th of March, 1815, for the term of 14 years, and the stone quarries at C., from the 29th Sept., 1817, for the term of fourteen years, paying for the slate pit the yearly rent of 70*l.*, and for the stone quarries the yearly rent of 130*l.* The *ad valorem* stamp on the first skin of the lease was 3*l.*, with a progressive duty of 1*l.* on the other skins. It appeared that possession could not be given of the stone quarries at the same time with the slate pit, nor till the time mentioned in the lease. The Court being of opinion that no fraud was intended: *Held*, that this lease was properly stamped under 55 Geo. 3, c. 184.

COVENANT. At the trial of this cause, before DALLAS, C. J. (Middlesex sittings after Michaelmas term last), a lease was produced, by which the plaintiff demised to the defendant a slate pit or slate quarry, at the north end of Swithland, and also certain stone quarries in or upon Mount Sorrel Hills in the county of Leicester, to hold to the defendant from the respective periods thereafter mentioned; viz. the

slate pit situated at Swithland, from the 25th March, 1815, for the term of fourteen years, and the stone quarries at Mount Sorrel Hills, from the 29th September, 1817, for the term of fourteen years thence next ensuing, paying, in respect of the slate pit in Swithland, the yearly rent of 70*l.*, and paying, in respect of the stone quarries and premises at Mount Sorrel Hills and Mount Sorrel, the yearly rent of 130*l.* It appeared that there had been some dispute, whether the defendant or some other person was to have the stone quarries, and that possession could not be given till the time mentioned in the lease. The *ad valorem* stamp on the first skin of the lease being 3*l.*, with a progressive duty of 1*l.* on the other skins (a sufficient duty on the aggregate amount of the two rents reserved), the counsel for the defendant objected, that, as the lease contained two *reddendums* for distinct properties at different rents, for different terms of years, to commence and conclude at different periods, the stamp duties to which the two rents would have been subject, had they been reserved by different instruments, should have been imposed on this lease; in which case the rent of 70*l.* would have been subject to the *ad valorem* duty of 1*l.* 10*s.* on the first skin, and the rent of 130*l.* would have been subject to an *ad valorem* duty of 2*l.*; and that, therefore, the lease was not properly stamped, as required by stat. 55 Geo. 3, c. 184. The jury found a verdict for the plaintiff, DALLAS, C. J., having reserved the point for the opinion of this Court. And now,

Vaughan, Serjt., moved to set aside this verdict and enter a nonsuit, on the grounds above mentioned; but the Court, saying that no fraud was intended, and that the whole was manifestly one transaction, rejected the application. *Vaughan* took nothing by his motion.

COCKELL and Another v. GRAY and Another.—p. 186.

Covenant to pay (among other instalments) an instalment within twelve calendar months from, &c. On the record the word "calendar" was omitted; but the record stated correctly the time of payment of other previous and subsequent instalments, without omitting the word "calendar:" Held, that this was no variance.

COVENANT to pay (among other instalments) an instalment of two shillings in the pound, within twelve calendar months from the date of the deed. On the record the word "calendar" was omitted, but the record stated correctly the time of payment of other previous and subsequent instalments, without omitting the word "calendar." At the trial, before DALLAS, C. J., (London sittings after Michaelmas term last) the jury found a verdict for the plaintiffs, the learned Judge giving leave to the defendants to move to set it aside and enter a nonsuit. Accordingly,

Pell, Serjt., now rested his motion, on the ground, that "months" in law were to be considered as lunar months, and that the omission of

the word "calendar" in the record, constituted a fatal variance; and he cited *Jocelyn v. Hawkins*.* But

The Court held, that the meaning of the word "months" must depend on the intention of the parties, and they adduced many instances, in commercial matters, where a calendar month was always intended; as in bills of exchange payable so many months after date, or in insurances effected for six months; and thinking that the parties to this deed clearly intended calendar months, they refused to disturb the verdict; and *Pell* took nothing.

Rule refused.†

* 1 Str. 446; and see *Lacom v. Hooper*, 6 T. R. 224; *Bishop of Peterborough v. Cateby*, Cro. Jac. 166; *Barksdale v. Morgan*, 4 Mod. 185; *Rex v. Adderly*, Doug. 463; *Rex v. Peckham*, Carth. 406.

† See *Lang v. Gale*, 1 M. & S. 111, and *Titus v. Preston*, 1 Str. 652.

WHITELEGGE v. RICHARDS, Gent.—p. 188.

An order drawn up in the name of the Court, by an officer of a court of justice, is, until amended or set aside, the order of the Court. Therefore, where an officer of the Insolvent Debtor's Court, instead of drawing up an order for the further imprisonment of an insolvent, pursuant to the decision of the Court, drew up an order for his discharge, and the insolvent was thereon discharged, the order not having been amended or set aside: *Held*, on demurrer to the declaration, that no action lay by a creditor of the insolvent against the officer, though the declaration stated that the officer wrongfully, falsely, and unlawfully, made out and issued such order, purporting to be an order from the Court.

THE declaration stated that the plaintiff, on the 24th October, in the first year of the King, in the Court of Common Pleas at Lancaster, recovered against Strettell Chorlton 90*l.* 11*s.* 4*d.*, damages and costs; that on the 21st June, in the year aforesaid, in the said court, (the said action then pending in the said court,) upon application of Strettell Chorlton's bail to surrender their principal, it was ordered by the Court that Strettell Chorlton should be forthwith committed to the custody of the keeper of the jail of the county of Lancaster, as to the said action, and that his bail from their recognizances should be wholly discharged; and Strettell Chorlton was thereupon committed to the custody of the said keeper, as to the said action, and remained in his custody, as to the said action, from thence until the discharge of Strettell Chorlton, that Strettell Chorlton being so in custody, on the 7th November, 1820, applied, by petition, to the Court for relief of Insolvent Debtors, for his discharge from such confinement, according to the provisions of the act in such case made and provided; and that the Court for relief of Insolvent Debtors, on the 13th November, in the year aforesaid, ordered that the said prisoner, instead of being brought before the Court for relief of Insolvent Debtors for final examination touching the matters of his petition and schedule, should be examined touching the matters aforesaid, before his Majesty's justices of the peace for the county of Lancaster, in open court, at the adjourned general quarter sessions of

the peace at Lancaster, on the 2d January then next; and, in case it should appear to the justices upon such examination, or by evidence, that the prisoner was entitled to the benefit of the act, then that the justices should so declare and adjudge, and should certify the same to the Court for relief of Insolvent Debtors; and that, in case it should appear to the justices by such examination, or by evidence, that the prisoner had contracted any debts, against which he should seek to be discharged, fraudulently, or without any reasonable or probable expectations, at the time of contracting the same, of being able to pay the same, or should, with intent to conceal the state of his affairs, or to defeat the objects of the said act, have destroyed, or otherwise wilfully prevented the production of any books, &c. relating to such of his affairs as were subject to investigation under the act, or should have kept or caused to be kept, false books, or made false entries, or have wilfully and fraudulently altered or falsified any such books, papers, or writings, or should in any respect, have been guilty of fraud, in contracting, discharging, or concealing any debt due from the prisoner to any of his creditors, or should have fraudulently made away with, charged, mortgaged, or concealed any part of his property, of what kind soever, either before or after the commencement of his imprisonment, for the purpose of diminishing the sum to be divided among his creditors, or of giving an undue preference to any of the said creditors, or that the said prisoner should have put any of his creditors, as should have proved their debts, to unnecessary expense by any vexatious or frivolous defence, or improper delay in any suit for recovering the same, or that the said prisoner should have wilfully or fraudulently omitted any effects or property whatever, to the value of not less than 20*l*. in the whole in the schedule, which the said prisoner should first have delivered into that court, then such justices should so declare and adjudge; and should also declare and adjudge, in like manner, and subject to the same limitations as are in the act mentioned and imposed in such cases upon the Court for relief of Insolvent Debtors, for what period of time the prisoner should remain in actual custody, before he should be discharged from custody, by virtue of the said act, and that the justices should forthwith certify the same to the Court for relief of Insolvent Debtors; and if the said justices should be of opinion that the prisoner was so entitled to be discharged, it was further ordered, that the prisoner should, in open court, before the said justices, subscribe and take the oath annexed to the duplicate of the schedule, and should execute the warrant of attorney therewith sent, and sealed with the seal of the Court for relief of Insolvent Debtors; and it was further ordered, that the whole of the proceedings should be forthwith returned by the justices to that court. The plaintiff then averred, that, at the adjourned general quarter sessions of the peace for the county of Lancaster, holden at Lancaster, on the 2d January, in the 1st year of George the IV., Strettell Chorlton was examined by the justices of the peace then and there assembled at the sessions in open court, according to the form of the statute; and afterwards, the justices certified to the Court for relief of Insolvent Debtors, that the prisoner had that day,

pursuant to an order of the Court for relief of Insolvent Debtors and the said act, been examined before the justices there assembled in open court, at the then present general quarter sessions of the peace, touching the matters of his petition and schedule, mentioned in the order, and due proof having been made before the justices at the said time and place, of the service of the respective copies of the said order, and such other notices of such proceedings as were required by the 21st section of the said act, and by the said order and rules of Court thereto annexed; and the prisoner having in open court, before the justices, subscribed and taken the oath annexed to the duplicate of the schedule, and executed a warrant of attorney, as required by the 25th section of the said act, the said justices declared and adjudged the prisoner entitled to the benefit of the act, as to all the creditors of the prisoner, or persons claiming to be creditors, mentioned and described in the duplicate of the said schedule. But the justices further declared and adjudged, that the prisoner had contracted the debt due to the plaintiff, mentioned in his schedule, without any reasonable expectation, at the time of contracting the same, of being able to pay the same; and, also, that he had put the plaintiff, who had proved his debt in the manner required by the act, to unnecessary expense, by a frivolous defence, in an action at law, in the Court of Common Pleas, at Lancaster, for recovering the same; and the justices, therefore, also declared and adjudged, that such prisoner should remain in actual custody at the suit of the plaintiff, for the space of two years, before such prisoner should be discharged from custody by virtue of the said act. The plaintiff then averred, that the certificate was afterwards, in due manner, transmitted and delivered to the Court for relief of Insolvent Debtors, and that before and at the time when the certificate was so transmitted and delivered, the defendant was, and still is, a clerk and officer of the Court for relief of Insolvent Debtors, before then appointed by the same Court; and that it was the duty of the defendant, as such clerk and officer, to have written and issued a certain order of the Court for the relief of Insolvent Debtors, ordering and directing that the prisoner should be discharged from custody when, and so soon as he should have been in such actual custody for the full period of time expressed in such certificate as aforesaid. Yet that the defendant being such clerk and officer, not regarding the duty of his office, and intending to injure the plaintiff, and to cause Stretton Chorlton forthwith to be discharged from such custody, without paying or satisfying the said damages and costs, and to deprive the plaintiff of the means of recovering the same, whilst Strettell Chorlton remained in such custody as aforesaid, at the suit of the plaintiff, for the cause aforesaid. and whilst the said damages and costs were wholly unsatisfied to the plaintiff, on the 13th January, 1821, without any authority from the Court for the relief of Insolvent Debtors, wrongfully, falsely, and unlawfully made out and issued an order, purporting to be an order from the Court for the relief of Insolvent Debtors, dated the day and year last aforesaid, entitled in the matter of the petition of Strettell Chorlton, a prisoner in actual custody in the castle of Lancaster, seeking the be-

nefit of the act passed for the relief of Insolvent Debtors, and directed to the keeper or jailer of the said jail or castle, and purporting thereby, that the said Court for relief of Insolvent Debtors, (upon reading a certificate that the prisoner had, pursuant to an order of that court, been heard and examined touching the matter of his petition and schedule mentioned in the said order, and declared and adjudged entitled to the benefit of the said act,) did order that the prisoner should be discharged from custody as to the plaintiff, at whose suit the prisoner was detained in the custody of the said keeper or jailer : whereas, in truth, and in fact, the Court for relief of Insolvent Debtors did not, at any time, pronounce any such order as last aforesaid, or give any authority to the defendant to write, make out, or issue the same, by means whereof the last-mentioned order being, on the 16th January, 1821, exhibited to the keeper of the said jail, Strettell Chorlton was thereupon forthwith discharged from custody, as to the said action, and suffered, and permitted to go at large wheresoever he pleased, against the will of the plaintiff ; and that Strettell Chorlton did, then and there, go from and out of such custody wheresoever he pleased, the said damages and costs then and still being and remaining wholly unsatisfied to the plaintiff, by means whereof the plaintiff had been greatly injured, and hath lost all means of enforcing payment from Strettell Chorlton, of the damages and costs aforesaid.

The declaration contained four counts, in substance the same. Demurrer and joinder.

Vaughan, Serjt., for the defendant. The order stated in the declaration is the order of the Court, and not of the officer, and the officer is not responsible to any individual for its correctness, but only to the Court for the due discharge of his duties, since under the 21st section of the Insolvent Act the Court is directed to make the order, not the officer. Then, the declaration does not show that the plaintiff has any interest in the detention of Chorlton, which can entitle him to sustain this action. By the Insolvent Debtors' Act,* the principle of the common law is altered, the arbitrary discretion of a creditor to detain his debtor is taken away, and where the debtor has been guilty of misconduct, he is subjected to a judicial sentence, as in any other case of criminal misdemeanor ; the plaintiff, therefore, is not deprived of any remedy by this order, nor has he sustained any damage. The wrong complained of is not a wrong towards an individual ; and a misfeasance of this kind affecting the administration of public justice cannot be the subject of an action. Perhaps, under a liberal interpretation of the 23d section of the Insolvent Act, which enables the Court to set aside an order fraudulently obtained, the Insolvent Debtors' Court might rescind this order and issue another ; but the order, till set aside or rescinded, is still the order of the Court, the validity of which, this Court, having no jurisdiction in error over the Insolvent Debtors' Court, cannot dispute, and the plaintiff might as well sue the Insolvent Debtors' Court itself, as the defendant, who is no more than the hand

* 1 Geo. 4, c. 119.

with which the commissioners act. There is no case in point. In *Smith v. Winford*, Lutw. 96, the plaintiff did not enter the issue in due time.

Taddy, Serjt., for the plaintiff. The order in question is not pleaded as being an order of Court, but as *purporting* to be an order of Court, and by the demurrer it is admitted that it was no order. The plaintiff has sustained an injury by this paper, which falsely purported to be an order, and the injury is averred in the declaration. The injury is the loss of that gage for the payment of his debt, which he possessed in confining the person of his debtor; for, as that confinement might ultimately induce the debtor to procure payment, the creditor has still an interest in the confinement, notwithstanding the operation of the Insolvent Debtors' Act. But the imprisonment under that act is not altogether penal, for the prisoner is directed in the act to be detained *at the suit of* the creditor,* so that if the objections which have been made to this action are well-founded they would apply equally to an action of escape. But the law presumes, that a creditor may derive advantage from the imprisonment of his debtor; and the defendant, who has wrongfully issued for the debtor's discharge a paper which is not an order of court, must be answerable for the plaintiff's loss. Here too there is an allegation of malice, under the word *wrongfully*, (*Drewe v. Coulton*, 1 East, 563, n.,) which, by the demurrer, is admitted to be true.

Vaughan, in reply. The plaintiff has no interest in the debtor's detention, because all his effects, future as well as present, are assigned to his creditors; and detention with a view to obtain satisfaction, can only be of advantage where the debtor still retains property, which, by such means, he may be induced to transfer: so that this action cannot be considered in the same light as an action of escape, in which the plaintiff obtains damages for the loss of a security in his debtor's person, which might ultimately have been beneficial to him. Malice is no part of the cause of action in such a case as the present, and would not form part of the proof at the trial; because the defendant, if liable at all, is liable for the misfeasance, whether accompanied with malice or not. As to the prisoner's being detained *at the suit of* the creditor, that expression is only meant to operate as a designation of the person, and does not alter the penal nature of the imprisonment.

Cur. adv. vult.

And now,

DALLAS, C. J., delivered the following judgment.

This case has been so recently before the Court, that it will be sufficient to refer to the pleadings as they appear on the face of it.

The question for our decision is, whether the declaration be substantially good?

In the argument at the bar, much has been gone into, and properly, which, however, upon the view we take of the subject, it will not now be necessary to consider.

It is sufficient to say, with reference to the single ground of our decision, that the defendant, in each of the counts, is stated to have been, at the time of the act complained of, an officer of the Court of Insolvent Debtors, and, that it was his duty, as such, to draw up and issue orders of the Court, such orders when issued, deriving effect from the authority, and as the act of the Court.

It must, or may occasionally happen to such officer, as to every person in a similar situation, to draw up rules and orders erroneously, and, in every court, the instance is familiar of applications being made to amend rules and orders, so as to make them conformable to that which was originally pronounced, or to what originally the rule or order ought to have been.

But, until such application and further order thereon, the rule or order issued remains an act of the Court itself. In this instance no amendment or change has been made, and, not having been made, the order in question remains upon the face of it the order of the Court.

The declaration alleges, that the defendant made and issued a certain order, purporting to be an order of the Court; treating it, therefore, as an order, in itself, averring only that, in fact, no such order was made out; but, appearing to be an order, and being by the declaration averred as purporting so to be, we think it must be taken as such, not having been repudiated or disclaimed by the court itself; and, consequently, that the action cannot be maintained.

To this point we confine our decision, not meaning to give any opinion, whether, under different circumstances, and if so, under what circumstances, such an action can be maintained. It is sufficient to say, that in this case there must be judgment for the defendant.

Judgment for the defendant accordingly.

(IN THE EXCHEQUER CHAMBER.*)

The KING v. THOMAS WATTS.—p. 197.

The prisoner having promised in payment for some goods an acceptance by a London banker, gave a bill addressed to, and purporting to be accepted by, Williams and Co., No. 8, Birchin lane, London; it was proved that Williams, Burgess and Co., of No. 20, Birchin lane, had not accepted the bill, and that no other bankers of the name of Williams and Co. were known in London; but no evidence was adduced to show that Williams and Co., of No. 8, Birchin lane, had not accepted the bill: *Held*, that there was no forgery proved against the prisoner, by ten judges against one, BAYLEY, J., *absente*.

THE prisoner was tried before BEST, J., at the last assizes for Devon. The first count of the indictment was for forging at East Stonehouse, on the 6th April, 1821, an acceptance by Messrs. Williams and Co., to a certain bill of exchange, as follows, viz.

* The publication of this case, which was decided in Hilary term last, was unavoidably postponed till the present time.

No. 117. 200*l*.March 28th,
Swansea Bank, 1821.

Two months after date, pay to Mr. John Tipper, or order, two hundred pounds for value received.

Hy. Williams and Co

To Messrs. Williams and Co.,
Bankers, Birchin Lane, London.

With intent to defraud Thomas Baylis, John Rutledge, and Jonathan Ramsey.

The second count was for uttering and publishing as true the said forged acceptance on the said bill of exchange, knowing the same to be forged, with a like intent.

He was acquitted on the first, and convicted on the second count.

It was proved that, in April last, the prisoner purchased of the prosecutors, wheat to the amount of 240*l*. At the time he made the purchase, he agreed to pay by the acceptance of a London banker. Before the wheat was delivered to him, he produced to the prosecutors a bill in these words and figures:

No. 117. 200*l*.March 28th,
Swansea Bank, 1821.

Two months after date, pay to Mr. John Tipper, or order, two hundred pounds for value received.

H. Williams and Co.

To Messrs. Williams and Co.,
Bankers, 3, Birchin Lane, London.

Accepted, Williams and Co.

He was asked how he proposed to pay the remainder of the money, and said he would draw on the same bankers for the balance; he then drew the following bill in the prosecutors' compting house.

40*l*.

South Tawton, April 6th, 1821.

Two months after date, pay to our order forty pounds for value received, as advised by
Swansea Bank.

Thomas Watts,
For P. Watts and Co.

To Messrs. Williams and Co.,
Bankers, Birchin Lane, London.

Accepted, Williams and Co.

He said he would send this bill to London to get it accepted. It was afterwards sent back to the prosecutors, accepted as it now appears.

Whilst he was drawing the bill, one of the prosecutors asked him, if Williams and Co., the acceptors, were Williams, Burgess and Co. The prisoner said, the acceptors were Williams, Burgess and Co. Prosecutor said it was improbable there should be two firms of the same

name in the same street, and prisoner answered it was improbable. The figure 3, which stands between the words bankers and Birchin Lane in the 200*l.* bill, was not then on the bill. The witnesses did not observe whether the small figure 3 in the corner was on the bill at this time. It appeared to a witness acquainted with bills, not to be a part of the address, but was like a figure that the holders of bills sometimes put on them before they leave them for acceptance. But the person who presented this bill had not observed whether it was on the bill when he presented it for payment or not. A person to whom he presented the bill, at the house No. 3, Birchin Lane, took this bill behind a desk, and had an opportunity of writing on it one or both of these figures.

But the person who presented it did not observe, when he received the bill back, whether either of these figures were then on it.

There are London bankers at No. 20, Birchin Lane, of the names of Williams, Burgess and Co., who usually accept bills in the firm of Williams and Co. This bill was not accepted by that firm. No other bankers of the names of Williams and Co. were known to carry on business in Birchin Lane, nor were there any other London bankers under that firm. The words "Williams and Co." were on a brass plate on the door of No. 3. There was no evidence to show by whom these bills were accepted.

The prisoner proved that three bills in the following form had been paid at No. 3, Birchin Lane, viz.:

No. 345. 30*l.*

South Tawton, March 5th, 1821.

Two months after date, pay to our order thirty pounds for value received.

Thomas Watts,

For P. Watts and Co.

Messrs. Williams and Co.,
Bankers, Swansea.

Accepted, Messrs. Williams and Co.,
Payable at No. 3, Birchin Lane, London.

BEST, J., left it to the jury to say, whether the acceptance of the 200*l.* bill was the acceptance of any London bankers.

The question for the opinion of the Judges was, whether the prisoner was properly convicted. There was also a further question, viz.: whether, considering the manner in which the bill is stated in the indictment, it was necessary for the prosecutors to prove, that the 3 in the corner was on the bill when it was tendered in payment.

Williams, C. F., for the prisoner. No evidence has been adduced to show, that the acceptance which the prisoner is charged with having forged, was not the acceptance of those persons whose acceptance it purports to be; namely, the acceptance of Williams and Co. of No. 3, Birchin Lane; if the acceptance was written by them, the circumstance of their not being bankers would not render the prisoner guilty of a forgery. The jury indeed have found that he did not forge the acceptance, and even wilful misrepresentation made after the uttering a bill, will not render that a forgery which was not so at the time when

the bill was drawn. *Rex v. Webb*; * *Walker's* case, Russell, 1420; *Heway's* case, 2 East, P. C. 856. Secondly, there is a variance in the setting out of the bill on record, no evidence having shown that the bill when uttered contained the figure 3 stated on the record. Thirdly, it ought not, for the reason before stated, to have been left to the jury, whether or no this was an acceptance by London bankers.

Gaselee, for the crown, cited *Mead v. Young*, 4 T. R. 28; *Parkes* and *Brown's* case, 2 Leach, 775, 2 East, P. C. 963. as in point; and distinguished *Walker's* case.

William was heard in reply.

No judgment was given, but the prisoner received a free pardon.

* * Eleven Judges were present, of whom ten were of opinion that this case did not amount to forgery. They gave no opinion upon the point of variance, their judgment on the first point rendering that unnecessary.† BAYLEY, J., was absent at Chambers.

* CORAM BEST, J., SARUM, 1819. See a statement of the case, and decision in *Cam. Scacc.* post.

† The Reporters are indebted to one of their Lordships, who was present, for this information.

The KING v. MANASSEH GOLDSTEIN.—p. 201.

The forgery of a Prussian treasury note for one dollar, is within the statute 43 Geo. 3, c. 139, s. 1.

The prisoner was convicted of forging an instrument (purporting to be a Prussian treasury note,) in a foreign language. No count in the indictment containing any English translation of the note, the Court arrested the judgment on that ground. By eight Judges against two, WOOD, B., and BAYLEY, J., *absentibus*.

At the Old Bailey sessions, September, 1821, the prisoner was convicted before RICHARDSON, J., on the stat. 43 Geo. 3, c. 139, s. 1, of falsely making, forging, and counterfeiting, and causing and procuring to be falsely made, forged and counterfeited, a certain promissory note for the payment of money, purporting to be the promissory note for the payment of money of a certain foreign prince, that is to say, Frederick William, king of a certain foreign country called Prussia, with intent to deceive and defraud the said Frederick William against the form of the statute.

In other counts, the instrument was stated to be a certain promissory note for the payment of money, purporting to be the promissory note for the payment of money of Altenstein, known by the name and description of baron D'Altenstein, he the said Altenstein, being a minister entrusted by and in the service of the said Frederick William, so being such foreign prince as aforesaid, with intent to deceive and defraud the said Frederick William.

In other counts, the said Altenstein was stated to be "a person resident in a certain foreign country called Prussia." And, in other counts, the intent charged was to deceive and defraud the said Altenstein.

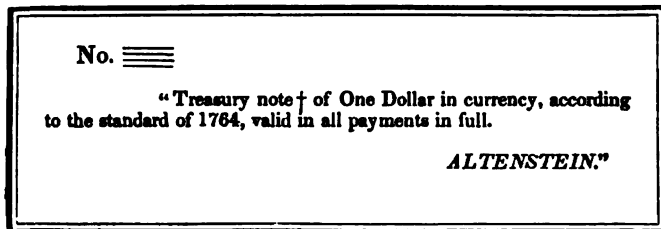
In another set of counts, the instrument was stated to be "an undertaking for the payment of money;" and in another set, "an order for the payment of money."

The instrument was set out on the record: and, in one set of counts, was stated to be in the German language; in another set, to be partly German and partly French; and in a third set, the particular language was not averred.

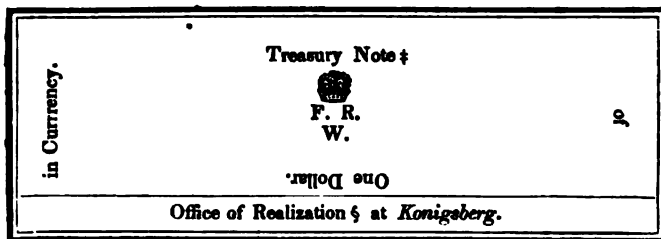
No count contained any English translation. It was proved at the trial, that these instruments are notes (or receipts) issued by the Prussian treasury, signed (*in fac similie*) by baron Altenstein, the Prussian minister of finance; that they are not only received by the Prussian government, in payment of all duties and taxes, but that any holder may, and often does, receive payments for them in cash on presenting them at the treasury offices established at Berlin, Königsberg, and Breslow; and that they pass as current money for all purposes throughout the Prussian dominions.*

This instrument, being translated by a witness, appeared to be, in English, as follows:

ON THE FRONT SIDE.



ON THE REVERSE SIDE.



The last words, which, in the original, were "Realisations comptoir zu Königsberg," were printed in red ink, and in the French character:

* An impression of the false instrument stated in the indictment accompanied the case submitted to the learned Judges. It was a moderate sized ticket, ornamented with engraved patterns, and was in the German language, with the exception of the words "realisations comptoir."

† Or receipt, the German word "*schein*" signifying either "note" or "receipt,

‡ Or receipt.

§ Or payment.

but the witness said that the phrase "Realisations comptoir" was adopted into the German language.

The same witness, on cross-examination, stated that, in German, he should call an undertaking to pay money or promissory note, "*schuld-schein*," which literally means "receipt for a debt," and that the word "*schein*" alone does not import a promise to pay.

It was clearly proved that the prisoner, a German Jew, residing at Shadwell, having a correspondence with some persons in Prussia, and having in his possession a genuine note, had caused plates to be engraved, and many thousands of false notes to be struck off, in the city of London.

The evidence being closed, *Platt* for the prisoner, objected that the instrument stated in the indictment was not, nor did it purport to be, a promissory note, or an undertaking to pay money, or an order to pay money; and that it contained no words of promise, undertaking, or order. He cited *Mary Michell's case*, Foster, 119, East, P. C. 936; *Williams' case*, Leach, 114, 4th edit., East, P. C. 937; *Clinch's case*, Leach, 540, East, P. C. 938; *Jones' case*, Leach, 53, East, P. C. 941, decided on the stat. 7 Geo. 2, c. 22, respecting orders for payment of money, and argued from thence, that an order for payment of money must contain words importing a command, and must purport to be signed by some person having, or, at least, claiming to have authority to command such payment. He also cited *Hunter's case*, Leach, 624, East, P. C. 928, and *Thompson's case*, Leach, 632, *notis*, which were decided on the stat. 2 Geo. 2, c. 25, respecting receipts for money, to show that the signature of a name alone, or the word "settled" alone, could not be set out in an indictment for forgery as a receipt for money; although it might operate as such, without other matter connected with it by proper averments, so as to show that the whole matter taken together, purported on the face of it to be a receipt for money. He also cited *Reading's case*, Leach, 590, East, P. C. 981, to show that John Ring could not purport to be John King: and he observed that the effect of the instrument, when presented for payment at the treasury at Berlin, could not vary its purport.

RICHARDSON, J., overruled the objection, being of opinion, that this act of parliament, made to prevent the forgery in Great Britain of foreign securities, could not be understood to require, that these securities should possess the technical properties required by the municipal law of England; but that it was sufficient, if they imported, on the face of the whole instrument, an undertaking or order for the payment of money, which the learned Judge thought was the case with the instrument in question. The learned Judge was also inclined to think, considering the peculiar wording of the act, that it was sufficient, if the instrument was in fact an undertaking or order for the payment of money, and operated as such, (which appeared by the evidence to be the case here), and that it purported to be issued by any foreign prince or his minister, the word "purporting" in the act appearing to the learned Judge to refer rather to the person by or on whose behalf the instrument was issued, than to the form of the instrument itself.

The jury found the prisoner guilty.

The next day, *Platt* moved in arrest of judgment, on the ground that the false instrument was here set out only in a foreign language, and not translated or explained by averments on the record: that the object of setting out the instrument in cases of libel and forgery is, that the court which tries, and also a court of error, may judge whether it be what it is alleged to be, and whether it falls within the act or law on which the prosecution is founded; which functions the Court could not exercise in the case of a foreign instrument not translated or explained by averments, because the Court could no more take judicial notice of the meaning of German or French, than of Arabic or Chinese. He cited *Zenobio v. Axtell*, 6 T. R. 162, where it was holden that the translation of a foreign libel, without the original, would not suffice, and argued that the converse was equally true. He also cited *Lyon's case*, Leach, 597, East, P. C. 933, *Lloyd's case*, Leach, 608, notis, *Gilchrist's case*, Leach, 657, East, P. C. 982, and *Reading's case*, Leach, 590, East, P. C. 981, to show that indictments have been held insufficient, because the instrument set out did not, in the opinion of the Court, agree with the purport ascribed to it, of which advantage this prisoner was deprived, by setting out the instrument only in an unknown language. He also mentioned the stat. 4 Geo. 2, c. 26, s. 1, which requires all instruments to be in the English language, as fortifying the argument, that everything material must be stated or explained in that language.

RICHARDSON, J., expressed no opinion on this point, having resolved to submit it, and also the objection made at the trial, to the opinion of the learned Judges.

Both points were accordingly now submitted to their opinion, and the judgment was, in the mean time, respited.

Platt, for the prisoner, on the first point, in addition to the authorities adduced by him at the trial, cited *Reeve's case*, 2 Leach, 808, East, P. C. 984, notis, and *Rex v. Lockett*, East, P. C. 940, Leach, 94.

As to the second objection, he cited in addition the stat. 45 Geo. 3, c. 89, and *Mason's case*, Leach, 487, to show the accuracy which the law required in the specification of instruments like that laid in the indictment; and *Hudson's case*, Leach, 978, to show the necessity of the Judges being enabled to decide on the face of the instrument, whether or not it was within the act. He distinguished the case of libel in Welsh, (*Craft v. Boite*, 1 Wms. Saund. 242, n. 1,) on the ground that the Court is bound to take cognisance of the dialects of Great Britain, Hob. p. 126, pl. 157.

If it were urged, that the Judges would inform themselves of the translation if they could, the signification of the word "*schein*" would be found to signify "the act of shining," "lustre," "appearance," not a reality.* The addition of the word "*tresor*" only takes away the generality of "the act of shining," &c., and confines it to "the treasury;" but does not alter the signification of the word "*schein*" so as to bring it within the act.

* Noehden's Germ. Dict. word *schein*. Minshew's Dict. of Eleven Tongues, word *shine*

Law, C., for the crown, having argued that this instrument would, in England, be deemed a promissory note, undertaking, or order for the payment of money, and that it might be laid as such in the indictment, the form of words employed in such instruments being immaterial; [for which he cited *Shepherd's case*, East, P. C. 944, Leach, 226; *Lockett's case*, East, P. C. 940, Leach, 94; *Willoughby's case*, East, P. C. 944; *Morris v. Lee*, *Ld. Raym.* 1396, 8 *Mod. Rep.* 364, the definition of a bill or note in *Bayley on Bills*, pp. 1, 3, and the stat. 3 and 4 Anne, c. 9, s. 1,] urging that the note being averred to be for payment of money, as in *Elliot's case*, Leach, 175, it was therefore averred, that *valid in payments* meant payable; and having argued, that it must from its purport be deemed in Prussia to be an undertaking for the payment of money, the purport of an instrument being what appeared to be its object on the face of it; for which he cited *Edsall's case*, East, P. C. 984, Leach, 662 n., distinguishing *Jones's case*, *Reading's case*, and *Gilchrist's case*; and referring to *Reeve's case*, East, P. C. 984 n., Leach, 813, [in which HEATH, J., LAWRENCE, J., and THOMSON, B., held that a scrip receipt signed C. Olier, was well laid, purporting to be signed Christopher Olier, because the indictment was not on the face of it repugnant to the bill, or inconsistent with itself, and the ambiguity was explained by evidence;] and to *Elliot's case*, Leach, 175, [in which it was found by the jury, and that finding approved, that 50*l.* meant fifty pounds;] ABBOTT, C. J., stopped him, saying, that all the Judges present were satisfied, that the instrument was one upon which forgery might be committed under the statute; and he was desired to address himself to the objection, that no translation of the instrument appeared on the record, when he argued to the following effect.

It is not necessary, that the translation of the instrument should appear on the record, and this may be contended both upon principle and upon the authority of the cases.

And first upon principle. It is argued, that the tenor must be set out, and, the tenor being unintelligible in a foreign language, that a translation is necessary. But the translation would not supply the tenor. The purport of an instrument, and the law which gives it a peculiar character in a foreign language and country, are matters of evidence. No translation could supply several peculiarities on the face of the forged instrument, without which it would not be a resemblance of the genuine instrument. A variety of engravings, ciphers, and symbols which appear on it, are incapable of translation: the crown for instance, and the initials of the king of Prussia. These peculiarities form tokens well understood, and are necessary to constitute a resemblance to, and give it the character of, an order for the payment of money of the king of Prussia or his minister. The explanation of these peculiarities can be supplied by evidence alone. The instrument itself would convey to the mind of a Prussian, the authority of the king and order of his minister. The translation might convey a very limited and perhaps erroneous view of the obligation or authority which the whole matter on the face of the instrument imported. The instrument is set out; the authority is averred, by which it becomes an order;

the words of the statute are strictly followed, and a translation would not advance the matter.

Translation of such instruments might mislead. Suppose a French bill of exchange, exactly corresponding, when translated, with an English one. It is not necessary or usual to state in an English bill, in what the value is received; but it is otherwise in a French bill. The Court, looking at the translation of such a supposed French bill, would pronounce it valid: it would appear unobjectionable; but, inasmuch as it would not state upon the face of it the nature of the consideration, it would be, by the law of France, the law on which its validity depends, an absolute nullity.*

Neither is the translation necessary according to the authority of the cases. The analogy which the present case bears to a case of libel is not very obvious; but, admitting the analogy, the case of *Zenobio v. Axtell* was a decision, only, that the original or tenor must be set out. Libel, however, is slander reduced to writing, and the cases of slander are expressed, to show that translation is not required. Serjt. Williams's note to *Craft v. Boite*, 1st Wms. Saunders, Hobart's Rep. 126, 1 Rol. Abr. 86, (L), pl. 5, *Ross v. Lawrence*, Styles, 236.

Platt was heard in reply.

* * Of the ten Judges who were present (Wood, B., being absent from illness, and BAYLEY, J., being at Chambers), all save two were of opinion that the judgment ought to be arrested on the last point. And the judgment was arrested accordingly.†

* Manuel de Droit Français, par J. B. J. Pailliet, p. 1002, cinquième édit.

† The Reporters are indebted to one of their Lordships who was present for this information.

RUSSELL and Another v. MOSELEY.—p. 211.

"I hereby guarantee the present account of H. M. due to R. T. S. of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30th of Sept. next," (signed and dated:) *Held*, that the consideration sufficiently appeared on the face of this instrument under 29 Car. 2, c. 3, s. 4.

ASSUMPSIT on the following guarantee.

London, 26th April, 1816.

"I hereby guarantee the present account of Miss Harriet Mosely, due to R. T. Shorridge & Co., South Shields, of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30th September next.

"G. B. Mosely."

At the trial before DALLAS, C. J., (London sittings after Trinity term last,) the plaintiffs were nonsuited, with liberty to move to enter a verdict, if the Court should be of opinion that the plaintiffs were entitled to recover on the guarantee. Accordingly,

Hullock, Serjt., having in the last term obtained a rule *nisi* to that effect, when he distinguished this case from *Jenkins v. Reynolds*, Ante, p. 328, and *Saunders v. Wakefield*, 4 B. & A. 595, contending that

the consideration for the promise appeared on the face of the guarantee,

Vaughan, Serjt. now showed cause against the rule, and argued that the consideration did not appear with certainty: but that to reduce it to certainty, it would be necessary to resort to parol evidence, the very mischief against which the statute of frauds was pointed. He cited *Saunders v. Wakefield*.

But the Court were of opinion, that the consideration sufficiently appeared on the face of the instrument, and the rule was made

Absolute.

GREGORY v. HURRILL.—p. 212.

In an action in the Common Pleas, the question being, whether a debt was barred by the statute of limitations, the creditor proved an action commenced in the King's Bench six years before, and continuances regularly entered down to the term before the trial of action in C. P.: *Held*, that the debt was not barred.

THIS was an action of trover, brought under an order of the Vice-Chancellor, by the plaintiff, Gregory, against the defendant, his assignee, to try the validity of the commission issued against Gregory.

The cause was tried before DALLAS, C. J., at the London sittings after last Trinity term, when the plaintiff, Gregory, having relied on the statute of limitations, to show that there was no debt whereon the defendant could support the commission, the counsel for the defendant, in answer, produced an office copy of a roll in the Court of King's Bench of Michaelmas term, 53 Geo. 3, 1812, containing an entry of three writs of *capias alias* and *pluries*, with continuances on the writs of *pluries*, brought down to the term before trial; and these proceedings, the defendant's counsel contended, took the case out of the statute. It appeared afterwards, upon the motion for a new trial, that these proceedings in the King's Bench had gone no further: and that the Court of King's Bench had holden them to be regular. A verdict was found for the plaintiff, with leave for the defendant to move to set it aside, and enter a verdict for the defendant, the Chief Justice having reserved the point of law raised by the plaintiff's counsel, "whether the debt of the petitioning creditor was a good and legal debt to support the commission, or whether it was not barred by the statute of limitations."

Accordingly, *Vaughan*, Serjt., having in the last term obtained a rule *nisi* to this effect,

Hullock, Serjt. (with whom was *Lens*, Serjt.), now showed cause against the rule, and, after citing *Quantock v. England*, 5 Burr. 2628, *Ex Parte Dewdney*, 15 Ves. 479, and *Ex parte Roffey*, 2 Rose, B. C. 245, to show that a debt barred by the statute of limitations could not constitute a good petitioning creditor's debt, argued that continuances in another action and in another court, especially as the proceedings were never brought to a close, would not exempt an action in this

court from the operation of the statute of limitations, and he likened the case to that of *Smith v. Bower*, 3 T. R. 662, where an attachment of privilege was holden not to be a continuance of a bill of Middlesex so as to avoid the statute of limitations.

Vaughan, contra, was stopped.

DALLAS, C. J. The main question is, whether there was in this case a good petitioning creditor's debt, and that depends on the continuances, and on their having been regularly entered. The Court of King's Bench have decided that they were regularly entered, and the only objection here is, that this is a different proceeding. But I think the proceedings on this debt in the other action sufficient to take the case out of the operation of the statute here.

RICHARDSON, J. As long as a remedy was open by which the debt might have been recovered any where; it appears to me that it was not barred by the statute.

The rest of the Court concurring, the rule was made

Absolute.

DOE, Dem NICHOLSON and Others, v. MIDDLETON and Another.—p. 214.

Where three commissioners and their successors were appointed to transact the business under an enclosure act, and the act of any two of them, was to be valid, an assessment executed by two, after the death of one of the three, and before the appointment of a successor, was holden valid.

EJECTMENT brought by the surviving commissioners of the Gosforth Enclosure Act,* to recover from the defendants (tenants of Skef-

* By which it is enacted, that John Nicholson, John Litt, and Joseph Cowper, and their successors, to be appointed as thereafter mentioned, should be, and were thereby appointed commissioners, for setting out, dividing, allotting, and enclosing the commons and waste grounds in the manner and according to the rules, &c., contained in the act and in the stat. 41 Geo. 3, c. 109, s. 29. (general enclosure act,) so far as the powers, &c., of the last-named statute were not altered or controlled by, or repugnant to, the Gosforth act, "and that all acts, matters and things, done by any two of the commissioners appointed or to be appointed by virtue of this act, shall, to all intents and purposes, be as valid and effectual as if the same were done and performed by all the said commissioners."

And it is further enacted, that if any of the commissioners appointed by the act, or to be substituted in the manner thereafter mentioned, should die, or neglect, refuse or become incapable to act for the space of 40 days, when occasion should require his or their attendance for carrying that or the recited act into execution, it should be lawful from time to time to elect and appoint a new commissioner or commissioners in the stead of him or them so dying, neglecting, refusing, or becoming incapable to act as aforesaid. The act then gave power to certain persons to nominate a new commissioner or commissioners in the place of the commissioners mentioned in the act, or any future commissioners, not interested in the enclosure, from time to time, as occasion might require; and in case such new commissioner or commissioners should not be appointed by the party or parties therein respectively authorized, to make such appointment, within 60 days after the happening of any such vacancy, and notice thereof given by the surviving and acting commissioners or commissioner, for the time being, in writing, then a commissioner or commissioners, to fill up such vacancy or vacancies, from time to time, "shall, and may be appointed by the other surviving or acting commissioners or commissioner for the time being, by

ington, Lutwidge, Esquire,) possession of two parcels of land, allotted by the commissioners, for the purpose of obtaining payment of the quantum of an arrear of charges and expenses of passing and carrying into execution the act of parliament. In the first count the demise was laid by John Nicholson and Joseph Cowper, on the 2d February, in the second year of the king. In the second count the demise was laid by John Nicholson, John Litt, and Joseph Cowper, on the 2d September, 55 Geo. 3. At the trial, before BAYLEY, J., (Carlisle Summer Assizes, 1821,) it appeared, that John Nicholson, John Litt, and Joseph Cowper, were, by the act, appointed commissioners, and that, in August, 1815, the three commissioners duly signed their award, by which the parcels of land in question were allotted to the testator of the defendant's landlord, who, since his testator's death, had received the rents. John Litt died shortly after the execution of the award, no new commissioner was appointed, and the two remaining commissioners, in January, 1821, made an assessment for certain costs and charges of carrying the act into execution, and gave notice thereof to Mr. Lutwidge. There was a nonsuit, with leave for the lessors of the plaintiff to move to enter a verdict. Accordingly,

Hullock, Serjt., in the last term, obtained a rule nisi to that effect; and now,

Taddy, Serjt., opposed the rule, on the ground, that there were three commissioners appointed, representing three separate interests. One of these was dead at the time of the demand, and though two by the act would constitute a quorum, still it was necessary that three should be in existence at the time of any act done.

Hullock, in support of his rule, urged, that it was provided by the act, that "all acts, matters, and things done by any two of the commissioners" should be as valid and effectual, as if the same were done and performed by all the three.

But the Court were of opinion, that the act required the existence of three commissioners, whereas only two were alive at the time of the demand, and held *Taddy's* objection fatal.

Rule discharged.*

writing, under their or his hands or hand, at any meeting of such surviving or other commissioners or commissioner, of the time and place whereof 14 days previous notice shall have been given," &c. &c.

And it is also enacted, that in case the purchase moneys arising by the sales mentioned in the act, should not be sufficient to defray all the costs, charges, and expenses, "then the deficiency thereof shall be made up by the several persons interested in the commons and waste grounds, and shall be paid in such shares and proportions, within such time, and to such person or persons, as the said commissioners shall direct, nominate, and appoint; and in case any person made subject to the payment of any money towards such costs, charges, and expenses as aforesaid, shall neglect or refuse to pay his or her share, or proportion thereof, within the time to be appointed as aforesaid, the same shall and may be levied and recovered in the manner directed by the said recited act."

* Another point was made in the case; but the Court decided expressly on the point above reported, and gave no opinion on the other.

RICHARD HENRY TOLSON, Esq., v. KAYE, M. D.
p. 217.

The 20 years within which a *formedon* in the *descender* ought to be commenced under the statute 21 Jac. 1, c. 16, begin to run when the title descends to the first heir in tail, unless he lie under a disability.

THIS was a writ of *formedon* in the *descender*, by which the demandant, in Michaelmas term, 2 G. 4, demanded of the defendant certain messuages, &c., situate in the parish of Wath-upon-Derne, in the county of York, and, after reciting the writ, averred, that Richard Tolson and Henry Tolson were seized of the tenements aforesaid, with the appurtenances in their demesne, as of fee and right, in the time of Charles the Second, late King of England, by taking the esplees thereof, to the value of 10*l.*, and being so seized, on the 18th June, in the 24th year of the reign of Charles the Second, gave unto John Molineux, Daniel Fleming, Richard Eaglesfield, Wilfred Lawson, Myles Pennington, and Andrew Huddleston, and their heirs, and to the survivor and survivors of them, and his and their heirs, the tenements aforesaid, with the appurtenances, to the use of Richard Tolson, and Anne, his wife, and their assignee and assignees for their lives, and the life of the longer liver of them, and after the death of the survivor of them, to the use of Henry Tolson, and the heirs male of his body, begotten or to be begotten upon the body of Frances, his then wife, with divers remainders over, with the ultimate remainder to the use of the right heirs of Richard Tolson; by virtue of which gift, and by force of the statute for transferring uses into possession, Richard Tolson and Anne, his wife, became and were seized of the said tenements, with the appurtenances in their demesne, as of freehold, for the term of their lives, and the life of the longer liver of them, in time of peace, in the time of the said Lord Charles the Second, by taking the esplees thereof, to the value of 10*l.*; and being so seized thereof, Richard Tolson, on the 2d July, 1689, died, leaving the said Anne, his wife, him surviving; and the said Anne, on the 27th March, 1714, died, leaving Henry Tolson her surviving, who, thereupon, by virtue of the said gift, and by force of the statute, became seized of the said tenements, with the appurtenances in his demesne, as of fee tail, (to wit, to him and the heirs male of his body, upon the body of Frances, his wife, begotten or to be begotten,) in the time of peace, in the time of the Lady Anne, late Queen of England, by taking the esplees, &c.; and Henry Tolson, on the 27th September, 1724, died, leaving Henry Tolson, his son and heir male of his body on the body of the said Frances, his wife, begotten, him surviving, whereupon the right to the said tenements, with the appurtenances, descended from the first-named Henry Tolson to the said Henry Tolson, his son, as tenant in tail male, according to the form of the gifts aforesaid, and the last-named Henry Tolson, on the 10th September, 1729, died, leaving Henry Tolson, his eldest son and heir, and William Tolson, his second son, him surviving; whereupon the right to the said tenement, with the appur-

tenances, descended to the last named Henry Tolson, as tenant in tail male, according to the form of the gift aforesaid; and the last named Henry Tolson, on the 2d February, 1763, died, without issue male of his body lawfully begotten, leaving Richard Tolson, son and heir of William Tolson, him surviving, (the said William Tolson having died in the lifetime of the last-named Henry Tolson, on the 30th September, 1748;) whereupon to Richard Tolson, as heir male of Henry Tolson, his grandfather, after the death of Henry Tolson, his uncle, the right to the said tenements, with the appurtenants, descended, as tenant in tail male, according to the form of the gift aforesaid; and the last-named Richard Tolson, on the 23d June, 1815, died, leaving Richard Henry Tolson the demandant, his only son and heir of his body lawfully begotten, him surviving; whereupon the right to the said tenements, with the appurtenants, descended to the demandant, according to the form of the gift aforesaid, for that, &c., and therefore he brings his suit, &c. The tenant, after several pleas, upon which issue was joined, pleaded, 25thly, that the supposed title and cause of action, if any, to and for the tenements aforesaid, with the appurtenants above demanded, did not first descend or fall, by force of the supposed gift aforesaid, within twenty years next before the suing out of the demandant's original writ; 26thly, that the supposed title and cause of action, if any, to and for the said tenements, did first descend, more than twenty years before the suing out of the demandant's original writ; 27thly, that the first-named Henry Tolson died more than twenty years before the suing out of the demandant's original writ, to wit, on the 27th September, 1724, upon whose decease the supposed title and cause of action, if any, to and for the said tenements, by force of the supposed gift, immediately devolved upon, and fell to Henry Tolson, his son, and that the last-mentioned Henry Tolson did not, upon the death of the first-named Henry Tolson, ever enter into the tenements aforesaid, with the appurtenants above demanded, by force of the supposed gift aforesaid, after the death of the first-named Henry Tolson, and that the supposed title and cause of action, if any, to and for the said tenements aforesaid, with the appurtenants, did not first fall to Henry Tolson, the son, by force of the supposed gift aforesaid, upon the death of the first-named Henry Tolson, within twenty years next before the suing out of the demandant's original writ.

The 28th, 29th, 30th, 31st, and 32d pleas were substantially the same, tracing the supposed descent, and denying that the said tenements fell to the several persons upon whom the said descent was supposed to be cast, within twenty years before the suing out of the demandant's original writ.

The replication to these pleas averred, that the right did descend and fall within the space of twenty years next before the suing out of the defendant's original writ. General demurrer to the replication to the above pleas, and joinder.

Hullock, Serjt., for the defendant. The replication to the 25th, 26th, 27th, 28th, 29th, 30th, 31st, and 32d pleas is ill; and the pleas are a sufficient answer to the action. The words of the 21 Jac. 1, c.

16, s. 1, expressly enjoin, that the action shall be brought within twenty years after the title has first descended or fallen, and exclude for ever the persons who do not enter within that time, and their heirs; but the title of an estate tail *first* descends or falls on the first heir in tail, who, in this case, was the Henry Tolson whose title accrued in 1724. If each succeeding heir was to be allowed the twenty years, instead of that period being limited to the heir on whom the title *first* descended, the whole object of the statute would be defeated, and claimants might start up against a possession of 500 years' duration. *Cotterel v. Dutton*, 4 Taunt. 826, is in point; but the decisions on the statute of fines,* *Stowel v. Zouch*, Plowden, 353, *Doe v. Jones*, 4 T. R. 300, bear closely on the question, and are in favour of the defendant, as is *Doe v. Jesson*, 6 East, 80.

Vaughan, Serjt., for the demandant. The question, which has never been expressly decided, is, whether, under circumstances such as the present, the demandant's title has not descended to him within twenty years. As issue in tail, taking *per formam doni*, he has a new and substantive estate. In so far as he must be of the blood of the donee in tail, it is true he takes by descent, but in so far as he takes nothing from his ancestor, but claims *per formam doni*, he may be esteemed in some sort a purchaser. This statute of limitations being in abridgment of common right, must be construed strictly; as, from *Penyston v. Lyster*, Cro. Eliz. 896, it appears that the preceding statute of 32 H. 8, c. 2, was construed. Bacon's Abridgment, tit. Limitation of Real Actions, is to the same effect, and a case in Brooks' Readings.† It is true, that, according to this argument, an heir in tail might sue at any distance of time, but this result follows from the nature of his estate being so different from the nature of heirship in fee. He has a new estate, so distinct, that if a tenant in tail agree to sell his estate, and receive the purchase-money, under an undertaking to suffer a recovery, and then die, the Courts will not compel the heir in tail to complete the recovery. *Machell v. Clarke*, 2 Ld. Rayd. 778, *Hinton v. Hinton*, 2 Ves. sen. 632. Then, the word "heirs" is not found in the second clause of the first section of the statute of James, from whence it may be presumed, that the statute did not intend to bar them. In *Stowell v. Zouch* the statute began to run in the time of the party claiming, and in *Cotterel v. Dutton* it is found as a fact, that the tenant in tail did not bring his formedon till fourteen years after he came of age, though more than twenty years had previously elapsed after the first descent of the title. The decisions on the statute of fines are not inconsistent with the doctrine now contended for, as that statute expressly includes privies within its operation.

Hullock, in reply. If a tenancy in tail can in any way be deemed an estate by purchase, the rule in *Shelley's case* falls to the ground. The heir in tail is not compelled to complete a sale begun by his ancestor, because that would operate as a new mode of barring estates tail. The statutes of limitations have always received a liberal construction, and the argument derived from the 32 H. 8 does not apply; the sta-

* 4 H. 7, c. 24.

† P. 183.

tute of James having passed, because the preceding statute was found insufficient for quieting possession. The statute of fines is couched in nearly the same words as the statute of James, but the statute of James is the stronger, by the introduction of the word *first*. In *Murray v. East India Company*, 5 B. & A. 215, ABBOTT, C. J., says, "The several statutes of limitation, being all in *pari materia*, ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same."

DALLAS, C. J. I am of opinion, in this case, that the statute begins to run from the time the title or cause of action first falls or accrues; and I am of this opinion, on the words of the statute, on the construction of them, on the reason of the thing; and if it be necessary, on the authority of decided cases, and of one in particular which was heard in this court.

I cannot agree in the position that statutes of this description ought to receive a strict construction; on the contrary, I think they ought to receive a beneficial construction, with a view to the mischief intended to be remedied, and this is pointed out by the very first words of the statute, which are, "For quieting of men's estates and avoinding of suits." It is therefore, that this statute, and all others of this description, are termed, by Lord KENYON, statutes of repose, and long before, and since the passing of this statute, this has been the principle which has guided the courts in the construction of them. First, then, the words of the statute are, "all writs of formedon shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years." And when did the title in this case first descend or fall? It descended, first, on that tenant in tail, who suffered twenty years to elapse without taking any steps to assert his right. Are then his heirs barred by his neglect? For this it is only necessary to refer to the subsequent words of the statute, "that no person or persons shall, at any time hereafter, make any entry into any lands, tenements, or hereditaments, but within 20 years next after his or their right or title, which shall hereafter first descend or accrue to the same, and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made." On the construction of this statute, the object of which is to quiet estates, is it falling in with the object of the statute, (when it draws a line as to the party who shall claim,) to say that after 140 years, or at any distance of time, it shall be competent for the issue in tail to set up a claim of this description? If so, instead of being a statute "for quieting of men's estates," it would produce the contrary effect, and unsettle all the titles in the kingdom. Therefore, construing the statute reasonably, and with reference to its object, it is clear the writ must be sued out within 20 years after the title first descends, and that has not been done in the present instance. As to cases, I refer to *Doe dem. George v. Jesson*, 6 East, 83, for the language of Lord ELLENBOROUGH. "The time allowed by the statute for making an entry might be indefinitely extended, if the construction contended for by the plaintiff were to be admitted. There is no calculating how far it might be carried by parents, and children dying under age, or continuing under

other disabilities in succession." And then applying himself to statutes of this description, he says, "The statute meant that the heir of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor to whom the right first accrued during the period of disability, and who died under such disability." That language was afterwards adopted by the rest of the Court. But, it is said, that there is a distinction between the heir of one seized in fee, and the heir of a donee in tail, because the former takes clearly by descent, the latter *per formam doni*. That distinction was taken in *Cotterell v. Dutton*, but it was repudiated by HEATH and CHAMBRE, Js., and the case is an authority in point to show, that the statute runs from the time when the title first descends or falls. On this ground, therefore, judgment must be given for the defendant.

PARK, J. It has been the endeavor of the jurisprudence of all civilized countries, to give repose to the possession of property, and the question is, whether we shall not give the best effect to this statute, by holding that the time specified begins to run from the period when the title first descends or falls. It has been urged that the plaintiff's case, is entitled to the indulgent consideration of the Court, but I think the indulgence ought to incline the other way; for, unless the limit pointed out by the statute be observed, no man is safe, but may be reduced to poverty after long and undisputed possession. I agree in the observations made by my Lord on the statute of James, and that the preamble of the statute settles this question; how should we quiet men's estates if we acceded to the arguments advanced on the part of the defendant? *Cotterell v. Dutton*, if not exactly in point, is as nearly so as can be, and, if any argument could arise on the course of courts of equity, MANSFIELD, C. J., who was conversant with those courts, was capable of giving it its due weight; he also puts the similarity between the cases on the statute of James, and the cases on the statute of fines. As to the arguments on the construction of the 32 Hen. 8, it is clear the statute of James passed, because the former had been found insufficient for its purpose. Under all the circumstances of this case, I think the judgment must be for the defendant.

BURROUGH, J. The statute of limitations was intended to quiet possessions, and particularly as to landed property; and we are to carry into effect the object of the statute; now if men were permitted to lie by till deeds and evidence were lost, no one could be safe, and they might lie by to any length of time, if they could exceed the time prescribed by the statute. The only question we have to decide here, is, whether the replication to the seven last pleas are good, and I think that all which do not allege a seism in the demandant within 20 years, are bad. There is no such allegation here. It is clear, that in the form-don it is not necessary to allege a seism in the donees, because it is sufficient if a declaration be certain to a certain intent in general, but in the after pleading there must be a higher degree of certainty, especially when the very point which would confer a title is denied. It is clear that by the demurrer, it must be taken for granted, that the de-

mandant was not seized within 20 years; if so, when did the title first descend? immediately on the death of Henry Tolson, and the formedon should have been brought within 20 years after that event. The formedon being a proceeding under the statute West. 2, if one tenant in tail discontinues, his heirs are put to a mere right and cannot bring their formedon. *Hunt v. Burn*, 2 Salk. 422, 1 Lutw. 779. There is a strong analogy between the cases on the statute of fines, and on this statute; but I object to *Brook's* readings as authority. They were no more than lecturers, and the cases cited from them have no bearing on the subject, because the action was wrong, and the plaintiff, therefore, out of court.

RICHARDSON, J. The question on this record is, whether the 20 years under the statute of James begin to run when the title descends to the first heir in tail, or whether each succeeding tenant has a right to sue during 20 years after the decease of his predecessors. In my opinion, the words of the statute are a sufficient answer to the present demandant. The first section of the statute is divided into four clauses; the first clause relates to proceedings or rights in existence at the time of the passing of the statute; the second to such as should arise afterwards. The first clause enacts, that "all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought of, or for any manors, lands, tenements or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session of parliament. And after the said twenty years expired, no such person or persons, or any of their heirs, shall have or maintain any such writ, of, or for any of the said manors, lands, tenements, or hereditaments;" if they do not enter within the time prescribed by the statute, what is the consequence? "that such persons, so not entering, shall be utterly excluded and disabled from such entry after to be made." Upon this branch of the first section, it is clear, on the words of the statute, that if a person who was entitled at the passing of the statute, did not sue within twenty years, he and his heirs were barred. But it is urged, that in the second clause, the word heirs is not found;—true; but it would be extraordinary if we should put a construction on that clause different from the construction on the first. The second clause runs thus: "and that all writs of formedon in descender, formedon in remainder, and formedon in reverter, of any manors, lands, tenements, or other hereditaments, whatsoever, at any time hereafter to be sued or brought by occasion, or means of any title or cause hereafter happening, shall be sued and taken within 20 years next after the title and cause of action first descended or fallen, and at no time after the said 20 years." What is the meaning of the words "next after the title, and cause of action first descended or fallen?" We must put on the words of this clause a construction consistent with the words of the first, and whether for a cause of action arising before or after the passing of the statute, persons not suing in time, and their heirs are barred. The decisions on this statute are not numerous, but *Cotterell v. Dutton*

is in point, and the distinctions between the heir of tenant in fee, and the heir of tenant in tail, was urged in that case, as it has been in the present, but was overruled, and HEATH, J., stated that no such difference existed. The learned Judge put the same construction on this statute as I am bound to do; and according to that construction, it appears that this title is stale. I think it unnecessary to advert to the statute of fines, but if I were to do so, I should think it right to put the same construction on all the statutes of limitation pursuant to the dictum of ABBOTT, C. J., in *Murray v. East India Company*.

END OF HILARY TERM.

REX v. WEBB.*—p. 228.

THE prisoner was tried before BEST, J., at the last Wiltshire assizes.

The indictment charged him with feloniously forging and counterfeiting a certain bill of exchange, as follows:

154*l.* 9*s.* 0*d.*

Wilton Wilts, Dec. 21st, 1818.

Two months after date pay to my order one hundred and fifty-four pounds, nine shillings, for value received and balance of account.

JOHN WEBB.

To Mr. Thos. Bowden,
Baize Manufacturer,
Rumford, Essex.

Accepted, Thos. Bowden.
Payable when due at
No. 40, Castle Street,
Holborn, London.

With intention to defraud Wadham Lock, William Hughs, and Henry Saunders, against the statute, &c. The second count was for feloniously uttering and publishing the same as true, with the like intention. The third count was for forging an acceptance (setting out the acceptance as above) with the like intention. And the fourth count was for uttering and publishing the said acceptance with the like intention.

It was proved on the part of the prosecution that no Thomas Bowden (the person appearing on the bill to be the acceptor) lived at No. 40, Castle Street, Holborn; and that no such person ever resided or carried on business, or was ever heard of at Rumford in Essex; and that there is no baize manufactory in Rumford.

Crim. Scacch. Nov. 13, 1819. The Reporters are indebted to one of their Lordships, who was present, for the statement of this case, and the decision thereon.

On the part of the prisoner it was proved by a witness, who stated himself to have been a partner in business with Thomas Bowden, (the acceptor,) that the acceptance was the hand-writing of Thomas Bowden. This witness, on his cross-examination, said, that Bowden never carried on the business of a baize manufacturer at Romford, and that the prisoner had known Bowden many years. Another witness said he knew Bowden, and that the acceptance was in his hand-writing. This second witness said, that he kept the house No. 40, Castle Street, Holborn, (the place where the bill is made payable,) and that he was surprised at Bowden's accepting the bill payable at No. 40, Castle Street, Holborn, as he did not reside there, and had no authority from this witness to make any bills payable at that house.

BEST, J., desired the jury, first, to consider whether there was any such person as Thomas Bowden, and if there was, whether the acceptance was his. The learned Judge told them, if there was no such person, or the acceptance was not his, and the prisoner, at the time he offered the bill to the prosecutor, knew, either that there was no such person, or, if there was, that he had not accepted it, they should find him guilty: and further directed the jury, if they thought the acceptance was Bowden's writing, to find whether he ever lived at Romford, or carried on the business of a baize manufacturer there; and told them that, if they thought Bowden never lived at Romford, or carried on any manufactory there, and that the prisoner, who appeared from the evidence to be acquainted with him, knew that, on addressing the bill to Bowden, as baize manufacturer at Romford, he was giving him a false description, for the fraudulent purpose of giving credit to the bill, they should find him guilty; and that the Judge would submit the propriety of the conviction under these circumstances to the Judges. The jury found, that there was no such person as Thomas Bowden. BEST, J., thought that there was such a person, and that the acceptance was his hand-writing, and wished, therefore, for the opinion of the Judges, whether, assuming that the acceptance was the hand-writing of Bowden, the prisoner, by the giving, on the face of the bill, Bowden a false description, and uttering the bill after it was accepted by Bowden with this false description, with intent to defraud, brought himself within any of the counts of the indictment against him.

Eleven of the Judges (BEST, J., being at Chambers) were of opinion that this case did not fall within the decision of *Parkes and Brown's* case, 2 East, P. C. 963, S. C. 2 Leach, 775; but that, though a gross fraud, it was no forgery.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
OTHER COURTS,
IN
Easter Term,
IN THE
Third Year of the Reign of GEORGE IV., 1822.

MEMORANDA.

IN the last vacation Robert Henry Blosset, Esq., Serjeant at Law, was appointed Chief Justice of the Supreme Court of Judicature in Bengal, and received the honour of knighthood. And

Willingham Franklin, Esq., Barrister at Law, was appointed one of the Judges of the Supreme Court of Judicature at Madras, and received the same honour.

SELLS *v.* HOARE.—p. 232.

On an application for a new trial, it appeared that a witness, who gave himself a false name at the trial, and was sworn on the Gospels, was, at that time, a Jew; *Held*, that the objection came too late, and that the oath, as taken, subjected the witness to the consequences of perjury, if he had sworn falsely.

Vaughan, Serjt., for the defendant, moved for a new trial in this cause, on the ground, among others, that a person calling himself Joseph Manning, had been duly sworn on the Gospels as a Christian: whereas it had been discovered since the trial, that his real name was Solomon Money, that he was a Jew before and at the time of the trial, and that he was still a regular attendant at the synagogue. The

learned Serjt. urged, that the jury, in coming to the conclusion which they had done, must have believed the testimony of this witness, who had given his evidence under a sanction which he could not, from his religion, consider binding.

But the Court held, that the objection came too late,* and that it would be productive of great danger and confusion if such affidavits were received. They were unanimously of opinion, that the oath, as taken, was binding on the witness both as a moral and religious obligation; and RICHARDSON, J., observed, that, if the witness had sworn falsely, he would be subject to the penalties of perjury, if indicted and convicted of that offence, under the oath which he had taken.

* See Phillips' Evidence, vol. i. p. 24, edit. 4, and the authorities there collected.

RICHARD ANGEL NOBES *v.* MOUNTAIN and Others. p. 233.

A bankrupt refusing to be sworn before the commissioners, on the ground that his legal adviser had not arrived: *Held*, that their warrant for his commitment, stating generally that he refused to be sworn, was sufficient, without adding the reason assigned by the bankrupt for his refusal.

Held, also, that the warrant committing him "until such time as he shall submit himself to us, or the major part of the said commissioners, by the said commission named and authorized, and take the oath prescribed by law for that purpose, and full answer make to our or their satisfaction, to the questions which may be put to him, by virtue of the said commission," was sufficient; and, that by "the questions which may be put to him, by virtue of the said commissioners," must be implied legal questions.

TRESPASS against the defendants, commissioners of bankrupt, for false imprisonment. At the trial, before BURROUGH, J., Salisbury Lent assizes, 1822, the defendants justified under their warrant, which was made out in consequence of the plaintiff's refusing to be sworn till his attorney arrived, though some delay was first granted in the expectation of such arrival. The warrant, signed and sealed by the defendants (after reciting the commission; that the commissioners having begun to execute the commission, had, on examination of witnesses, found the plaintiff a bankrupt; that notice was given in the Gazette for the plaintiff to surrender himself on certain days then past, and at a place in the warrant named, and that the plaintiff did not surrender himself; in consequence whereof the plaintiff was duly summoned, as had been represented to the commissioners, in pursuance of their summons for that purpose, to appear before them, the major part of the commissioners in the said commission named, on the 26th March last, at the White Hart, Cricklade, then and there to be examined, and make a full disclosure and discovery of his estate and effects: and that the plaintiff did not surrender himself to the major part of the said commissioners, who had signed a certificate thereof, proceeded as follows: "And whereas the said Richard Angel Nobes having been committed to his majesty's gaol of Newgate,* and being this day brought

* Under a judge's warrant, granted on the certificate of the defendants, for not appearing to their summons.

before us, the major part of the commissioners in the said commission named and authorized, by our messenger, in pursuance of our warrant for that purpose, to make a full discovery and disclosure of his estate and effects, was then and there duly called upon to take the oath usually administered to bankrupts, in order to our requiring him to make such disclosure and discovery of his estate and effects as aforesaid; but the said Richard Angel Nobes, in contempt of our authority, and in disobedience to the said commission, absolutely refused to take such oath; These are, therefore, to will, require, and authorize you, immediately upon the receipt hereof, to take into your custody the body of the said Richard Angel Nobes, and him safely convey to his majesty's prison in and for the said county of Wilts, and him there to deliver to the keeper of the said prison, who is hereby required and authorized, by virtue of the commission and statutes aforesaid, to receive the said Richard Angel Nobes into his custody, and him safely keep and detain, without bail or mainprize, *until such time as he shall submit himself to us, or the major part of the said commissioners by the said commission named and authorized, and take the oath prescribed by law for that purpose, and full answer make, to our or their satisfaction, to the questions which may be put to him by virtue of the said commission;* and for so doing this shall be your sufficient warrant. Given under our hands and seals at Cricklade, in the county of Wilts, this 10th day of May, in the year of our Lord 1821. A verdict having been found for the defendants,

Pell, Serjt., now moved for a new trial, on the ground that the power vested in commissioners of bankrupt being unknown to the common law, and such as ought to be strictly pursued and watched, the plaintiff ought to have been remanded under the judge's warrant, or that the commissioners' warrant ought to have stated the excuse offered by the plaintiff, when he refused to be sworn, and to have committed him only till he should answer all *lawful* questions; that being the expression used in the statute:* he insisted, that the latter objection, though technical only, ought to avail in such a cause; and he cited *Nathan's case*, 2 Str. 880, *Bracy's case*, 1 Ld. Raym. 99, *Hollingshead's case*, 2 Ld. Raym. 851, and *Miller's case*, 3 Wils. 420, 2 Bl. 881, S. C., relying on the report of it in Blackstone, as to the opinion of the Court on the objection to the concluding words of the warrant in that case. And he endeavoured to distinguish the present case from *Ex parte Page*, 1 B. & A. 568.

DALLAS, C. J. In a case of this description, it would be no answer to an objection to urge that it was merely technical; because it is often the duty of counsel to take such objections in favour of the liberty of the subject; but, when taken, they can only receive a reasonable construction. What are the facts of this case? The plaintiff was taken before the commissioners to be examined, and, if he wished to postpone his examination till the arrival of his professional adviser, his course of proceeding was obvious; he should have submitted to be sworn at

once, and then have requested to be remanded till such time as he might deem convenient. But unless he submitted, I do not see how the commissioners could take his statement of a single fact; every allegation so made must have been irregular. It must, therefore, be borne in mind, that the plaintiff was not committed for refusing to answer questions, but for refusing to be examined altogether. If he had been committed for refusing to answer any particular question, such question ought certainly to have appeared on the warrant; for no man is bound to answer a question illegally put: but this is not a case of that description. The objection, which resolves itself into an objection to the form of the warrant, though merely technical, might have been conclusive if a case had been adduced to support it: but I know of no case determined in express terms on such a ground, nor any which can support it by analogy. We must, therefore, look at the statute, and that, in the sixteenth section, empowers the commissioners to commit the bankrupt till he answer such lawful questions as may be put to him.

Undoubtedly, every question put by a legal tribunal will be intended to be lawful, though the word is often introduced for the sake of caution; but it is afterwards dropped in this same section of the statute, where the language is, "It shall and may be lawful to and for the said commissioners, or the major part of them, by warrant, under their hands and seals, to commit him, her, or them to such prison as the said commissioners, or the major part of them, shall think fit, there to remain without bail or mainprize, until such time as such person or persons shall submit him, her, or themselves to the said commissioners, and full answer make to the satisfaction of the said commissioners to *all such questions* as shall be put to him, her, or them as aforesaid." By the expression "such questions" will be intended legal questions, till the contrary appears; and in case of a commitment for refusal to answer any particular question, the contrary would appear on the face of the warrant, if the question were illegal. But the bankrupt is bound to submit in the first instance; he has failed to do so, before any questions were put; and, I think, this warrant does sufficiently follow the statute, and that the bankrupt was properly committed.

PARK, J. No one, who sits here, disputes the general principle, that the commissioners' authority must be pursued strictly; but there is no objection to this warrant on the face of it, whether it be considered on the statute or on the constant usage. The confusion has, I think, arisen from its being supposed that the bankrupt was committed for not answering a particular question; whereas, persisting in his refusal to be sworn, he was committed for not submitting at all. The form of the oath is, "You shall true answer make to *all such* questions as shall be put to you," not "to all such *lawful* questions;" for the commissioners cannot put any questions save such as are lawful. The commitment pursues the terms of the oath, and the language of the act: it is in the form which is generally used; and I have no doubt that the commitment is lawful.

BURROUGH, J. I am satisfied with the commitment now, as I was at the trial. This is not like a case where a bankrupt is committed for
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not answering some special question; but it is a case where the bankrupt resists the authority of the commissioners, and refuses to be sworn or to submit to any examination at all, and the commissioners could not act otherwise than as they have done. The bankrupt might have demurred, if an illegal question had been put to him; but the words on the face of the warrant, "the questions which may be put to him by virtue of the said commission," must be intended to mean legal questions.

As to any hardship upon the bankrupt, I can see none in the case. The commissioners waited some time for the arrival of his attorney, and, after his commitment, he might have been brought up whenever he pleased.

RICHARDSON, J. The objection relied on for the plaintiff, is the omission of the word lawful: but I am of opinion that the law does not require that word to be inserted. The sixteenth section of the 5 Geo. 2, c. 30, does not repeat the word lawful after employing it once, but it is to be implied that the act speaks all along of lawful questions; for no questions save lawful questions can be put; and the same must be implied as to this warrant, which, here, seems to me to correspond with the statute. Nor do the cases come up to this: *Miller's case* is the nearest; but the objection to the conclusion of the warrant there, was, not the omission of the word lawful, but that some of the questions asked were not inserted in the warrant, and the decision was perfectly right. No case, therefore, comes up to this objection, nor do the words of the statute.

Another objection was incidentally taken, and it was said that the bankrupt ought to have been remanded under the judge's warrant; but I think that a mistake. The fourteenth section empowers judges to apprehend and commit the bankrupt, upon the certificate of the commissioners, to gaol, "there to remain until he, she, or they be removed by order of the said commissioners, or the major part of them, by warrant under their hands and seals." It seems to me that the bankrupt could not have been remanded under the judge's warrant; for, when he was brought before the commissioners, the judge's authority was at an end. The commissioners were bound to detain the bankrupt till he submitted to answer: I do not think the commissioners could have acted otherwise; and there is not any weight in the objection that the excuse assigned by him for not answering should have been set forth on the warrant. No excuse could be admitted for a refusal to submit to be sworn. I am of opinion that there is no ground on which this application can be supported.

Rule refused.

BOOTHBY v. MORTON.—p. 239.

The surveyor under a drainage statute, is entitled to take advantage of a clause, limiting the commencement of actions to six months after the act complained of, though it does not appear he has made the compensation directed by the statute, for the act complained of, or pursued the course, on the observance of which the statute enables him to enter on the lands of others.

TRESPASS against the defendant as surveyor to the commissioners under the Witham drainage act.* The wrong complained of was the digging of a ditch of unusual width and depth, and throwing the soil, &c., on the land of the plaintiff, whereby plaintiff's crop of cole-seed was spoiled, and some of his sheep drowned. The ditch was dug about a year before the commencement of the action. The sheep were drowned, and the crop of cole-seed was spoiled, within six months of such commencement. At the last Lincoln assizes, BEST, J., before whom the action was tried, was of opinion that the action ought to have been brought within six months from the digging of the ditch, and directed a nonsuit; but gave leave to move to set it aside. Accordingly,

Vaughan, Serjt., now moved for a rule nisi to that effect, upon the ground that the commissioners could not claim the benefit of the clause (which directs that all actions against the commissioners shall be brought within six months, and not afterwards), unless it appeared that they had offered the compensation, or taken the other steps directed by the 91st section† of the act, which, he contended, must be deemed conditions precedent to the claiming any protection under the act, since it appeared by the 94th section,‡ that the commissioners' right of entry arose only on their pursuing the course there pointed out; in the same manner as by the usual provisions of turnpike acts, the digging of gravel is only allowed where a proper compensation has been offered.

But the Court refused the rule, observing, that the act contained nothing which afforded any ground for supposing that, even if the provisions pressed on their notice had not been complied with, the action against the commissioners could, therefore, be brought at any unlimited time; and *Vaughan* took nothing by his motion.

* 2 Geo. 3, c. 32.

† By the 91st section the commissioners are empowered to purchase lands, &c., and where persons shall refuse or neglect to treat, the commissioners are empowered to issue their warrant to the sheriff to impanel a jury, "which shall inquire of, assess, and ascertain, the sum or sums of money to be paid for the purchase of such lands, tenements, or hereditaments, or the recompense to be made for damages that may or shall be sustained as aforesaid, and to settle and ascertain in what proportions the sum or sums so assessed shall be paid to the several persons interested in the premises; and the said respective commissioners, or any five or more of them, shall give judgment for such purchase-moneys or recompense so to be assessed by such juries; which said verdict, and the judgment thereupon pronounced by the said respective commissioners, or any five or more of them, shall be binding and conclusive, to all intents and purposes, against all parties."

‡ By the 94th section, it is enacted, "That upon payment of such sum or sums of money as shall be agreed upon between the said respective commissioners, or any five or more of them, and the party or parties interested, or of such sum or sums of money as shall be assessed by any such jury to such party or parties, or legal tender thereof made, or to the principal officer or officers of any such bodies politic, corporate, or collegiate; or if he, she, or they cannot be found, or shall refuse to accept such money, upon payment thereof to such person or persons as the said respective commissioners, or any five or more of them, shall, by writing under their hands, appoint for the use of, and to be paid upon demand, without fee or reward, to such party or parties respectively the said respective commissioners, and all persons employed or authorized by them, or any five or more of them, shall have full power and authority to enter upon the lands, tenements, or hereditaments, in respect whereof such moneys were so agreed for or assessed, and to make use of such lands, tenements, and hereditaments, for the purposes of this act; and they shall be, and are hereby indemnified for so doing."

FORD v. WEBB.—p. 241.

Debt on stat. 2 Geo. 2, c. 23, for acting as a solicitor in the Court of Chancery (viz. in the matter of T. S., a bankrupt), the defendant not being a solicitor of the said court:—the plaintiff, having proved that the defendant (not a solicitor of the court) had been consulted, and had been instrumental in the matter of a petition to the Lord Chancellor, by the creditors of T. S. (which petition bore the name of certain admitted solicitors, and was intituled “In bankruptcy”), praying for the taxation of the bill of the solicitor to the commission, was nonsuited, and the Court refused to set the nonsuit aside: *Semble*, that proceedings in bankruptcy are not proceedings in Chancery.

DEBT on stat. 2 Geo. 2, c. 23, intituled “an act for the better regulation of attorneys and solicitors.” The sixth count of the declaration (on which alone the case turned) stated, that “the defendant within 12 months before action brought, did unlawfully, in his own name, act as a solicitor for and on the behalf of certain persons, viz. Isaac Howell, Charles Hare, and Edward Jones, in his Majesty’s Court of Chancery (the said court then being held at Westminster, &c., and then and there being a court in which solicitors had been accustomedly admitted and sworn), in the carrying on of certain proceedings in the said court, viz. proceedings in the matter of one Thomas Smith, a bankrupt, for and in expectation of gain, fee, and reward, the defendant not then being, nor having been admitted and enrolled a solicitor of the said court, or an attorney or solicitor of any one of the courts of law or equity mentioned in a certain act, &c., intituled, &c.” Plea, general issue. At the trial before DALLAS, C. J., at the Westminster sittings after Michaelmas term last, it appeared that the creditors of the bankrupt conceiving that the costs of the commission against Smith had been overcharged, applied to the defendant, who was not an attorney, but a certificated conveyancer, to get the bill taxed, and one of them stated that he gave the defendant directions to that effect; the action was brought against the defendant for acting as solicitor in the matter of a petition to the Lord Chancellor to have the bill taxed. The petition, intituled “In Bankruptcy,” was in the name of certain admitted and enrolled solicitors, and sent by them to the defendant in the country, in whose presence it was signed by the parties concerned. DALLAS, C. J., was of opinion, that the action could not be maintained, and the plaintiff was nonsuited, with leave to move to set the nonsuit aside and have a new trial. Accordingly,

Lens, Serjt., in the last term obtained a rule nisi to that effect. And now

Bosanquet, Serjt., who showed cause against the rule, mainly relied on the circumstance, that this proceeding was not in Chancery, that the petition was intituled “In Bankruptcy,” not “In Chancery,” and that if it had been intituled “In Chancery,” the Chancellor could not have heard it. *Ex parte Lund*, 6 Ves. jun. 782.

Lens, in support of the rule, contended, that by proceedings in Chancery were to be understood all such proceedings as came into the Court of Chancery; such as cases of lunacy and bankruptcy; otherwise much business done in the Court would be out of the reach of the act:

that the Lord Chancellor, therefore, when sitting in bankruptcy, was sitting in Chancery; and he cited the words of MANSFIELD, C. J., in *Collins v. Nicholson*, 2 Taunt. 322, "It is now decided, that all proceedings by petition to the Chancellor are proceedings in Chancery."

The Court concurred in discharging the rule. PARK, J., observed, that the Lord Chancellor sat in bankruptcy under a separate commission; and that the Judges who were empowered to sit for the Lord Chancellor, as keeper of the great seal, could not sit in bankruptcy. RICHARDSON, J., added, that the declaration, which alleged that the defendant had acted as a solicitor in the carrying on of certain proceedings in the Court of Chancery, had not been borne out.

Rule discharged.*

* See stat. 58 Geo. 3, c. 24, s. 1, 2, and 3.

LANGLEY v. SNEYD and Others.—p. 243.

A., on the marriage of his daughter, C., conveyed property to the use of himself, for life; remainder to the use of B., his daughter's intended husband, for life; remainder to the use of C., for life; remainder to the use of the sons of the marriage successively in tail; remainder to the use of the daughters of the marriage, as tenants in common in tail; reversion to the use of A. A. afterwards, on his death, devised all his property, not before settled, to the use of his widow, for life; remainder to the use of B., for life; remainder to the use of C., for life; remainder to the use of their sons successively in tail, (subject to a term for the provision of younger children;) remainder to the use of the daughters, as tenants in common in tail; remainder to the use of C., and her heirs. B. and C. afterwards levied a fine of all the before-mentioned premises to the use, (subject to the uses in the settlement and will mentioned,) of such person as C., by will in writing, or any writing of appointment, purporting such will to be by her signed, in the presence of, and attested by three or more witnesses, should appoint; (which will, or writing of appointment in nature of a will, C., notwithstanding her coverture, was thereby empowered to make,) and in the mean time, and for want of such appointment for the whole or any part, to the use of C. and her heirs. C. having survived B., by whom she had no issue, married D., whom she also survived, and then died, leaving E., an only son by D. To this son, C., in 1819, by an instrument purporting to be her will, signed in the presence of, and attested by three witnesses, left all her real estate in fee, the instrument containing a provision, that the property should go over to C.'s sister, in case of E.'s dying in C.'s lifetime. E. shortly afterwards died a minor, intestate, and without issue: *Held*, 1. That the instrument executed by C., in 1819, did not, as to the estates comprised in the fine, operate as an execution of C.'s power of appointment, but as a devise by her, by force of her interest. 2. That E. took by descent from his mother, and not by purchase.

THIS case came before the Court by the direction of his honour the Vice-Chancellor, and arose under the following circumstances.

Indentures of lease and release and settlement, bearing date, February, 1777, were executed by and between William Bowyer, of the first part; Thomas Ley, and John Goodwin, of the second part; Moreton Walhouse, and Arthur Bowyer, brother of the said William Bowyer of the third part; Edward Walhouse Okeover, only child and heir apparent of the said Moreton Walhouse, of the fourth part; and Margaret Bowyer, daughter and only child, and heiress apparent of the said William Bowyer, of the fifth part; whereby, (after reciting that a marriage was intended then shortly to be solemnized between the said Edward

Walhouse Okeover, and Margaret Bowyer, by the mutual consent of their respective fathers, and further reciting a settlement made by Moreton Walhouse, in prospect of the marriage, and providing for younger children,) William Bowyer, (in consideration of the intended marriage, and of the settlement and conveyance so made by Moreton Walhouse, and for settling and conveying the manor, &c., thereafter mentioned to such uses, &c., as are thereafter mentioned, and for making a provision for the said Margaret Bowyer, and the issue of the said marriage,) did grant, &c., to Thomas Ley, and John Goodwin, their heirs and assigns, the manor, &c., therein particularly mentioned, to hold the same unto Thomas Ley, and John Goodwin, their heirs and assigns, to the uses thereafter mentioned, to take effect from the solemnization of the said intended marriage, viz. to the use of William Bowyer and his assigns during his life, without impeachment of waste; remainder to the use of Thomas Ley, and John Goodwin, and their heirs during his life, in trust to support contingent uses and estates; remainder to the use of Edward Walhouse Okeover, and his assigns for the term of his life, without impeachment of waste; remainder to the use of the said trustees and their heirs during his life, to support contingent remainders; remainder to the use of Margaret Bowyer, his then intended wife, and her assigns during her life, without impeachment of waste; remainder to the use of the same trustees and their heirs during her life, to support contingent remainders; remainder to the use of Moreton Walhouse and Arthur Bowyer, their executors, administrators, and assigns, for the term of 500 years, without impeachment of waste, upon certain trusts therein mentioned, for the raising portions and maintenance for daughters and younger sons; remainder to the use of the first and other sons of Edward Walhouse Okeover, on the body of Margaret, his intended wife, to be begotten, and of the heirs of their respective bodies successively; remainder to the use of the daughters of Edward Walhouse Okeover, on the body of the said Margaret to be begotten, equally as tenants in common, and of the heirs of their respective bodies, with remainder or reversion to the use of William Bowyer for ever.

Soon after the execution of these indentures of February, 1777, the marriage was solemnized between Edward Walhouse Okeover, and Margaret Bowyer.

Afterwards, William Bowyer duly made and published his last will and testament in writing, dated September, 1780, whereby, (amongst other things,) he devised to Thomas Ley and Arthur Bowyer, their heirs and assigns, all and every his real estates whatsoever, not settled on his daughter's marriage with Edward Walhouse Okeover, except certain estates therein mentioned, subject to the payment of such part of his debts, as the estates so excepted should fall short of paying, to the use of his wife, Christiana Bowyer, for the term of her life, without impeachment of waste, in lieu of dower; remainder to the use of his son-in-law, Edward Walhouse Okeover, for his life, without impeachment of waste; remainder to the use of the same trustees, and their heirs during his life, in trust to support contingent uses; remainder to

the use of his daughter, Margaret Okeover, wife of Edward Walhouse Okeover, for her life, without impeachment of waste; remainder to the use of the same trustees, and their heirs during her life, in trust to support contingent uses, and from and immediately after her decease, (subject to and charged, and chargeable with the sum of 7500*l.*, payable to the daughter, younger sons, or younger son of Edward Walhouse Okeover, by Margaret, his wife,) to the use of the first and other sons of Edward Walhouse Okeover, on the body of Margaret his wife, and the heirs of their bodies respectively, successively; remainder to the use of the daughter of Edward Walhouse Okeover, on the body of Margaret his wife, equally, and the heirs of their respective bodies as tenants in common, with remainder to the use of his daughter, Margaret Okeover, her heirs and assigns for ever.

William Bowyer died in the same year, without having revoked or altered his said will.

An indenture, dated the 14th October, 1786, was made and executed by and between Edward Walhouse Okeover, and Margaret his wife, of the one part, and John Sneyd, of the other part, whereby, (after reciting the indentures of lease and release, and settlement of February, 1777, and the said marriage and will of William Bowyer, and the death of William Bowyer, and that Christiana Bowyer was then living, and that Edward Walhouse Okeover had not any issue by Margaret his wife; and also reciting, that Edward Walhouse Okeover and Margaret his wife, had consented and agreed, that the reversion and remainder in fee simple expectant, on the determination of the estates for life of Edward Walhouse Okeover and Margaret his wife, and, in default of issue of their bodies, of and in the manor, and the several other hereditaments and premises comprised in the therein mentioned indenture of release and settlement, and whereof Margaret Okeover was then seized, by virtue of or under the limitations contained in the same indenture, and also the reversion or remainder in fee simple, expectant on the determination of the several estates for life of Christiana Bowyer and Edward Walhouse Okeover, and Margaret his wife; and in default of issue of the body of Edward Walhouse Okeover, by Margaret his wife, and whereof Margaret Okeover was then seized or entitled to by virtue of or under the will of her late father, should be respectively limited, settled, and assured, in such manner, and subject to such power of appointment by Margaret Okeover as therein-after mentioned; for which purpose they, the said Edward Walhouse Okeover and Margaret his wife, had agreed to levy such fine as hereinafter mentioned;) Edward Walhouse Okeover, for himself and for Margaret his wife, their heirs, executors, and administrators, covenanted with John Sneyd, his heirs and assigns, that they, the said Edward Walhouse Okeover and Margaret his wife, would levy a fine to John Sneyd, and his heirs, of the said manor, &c., in the said indentures of lease and release and will mentioned; first, to confirm the several uses, &c., in the said recited indenture of release and settlement and will, respectively limited, antecedent to the remainder or reversion in fee thereof, respectively limited to the right heirs of William

Bowyer, deceased, and to the use of Margaret Okeover, her heirs and assigns for ever; and subject to the said several uses, &c., and as the same should respectively end and determine, to the use of such person and persons, and for such estate and estates, and in such parts, shares, and proportions, and for such intents and purposes, and subject to such provisoes, restrictions, and limitations, as Margaret Okeover, from time to time, during her life, by her last will and testament in writing, or any writing of appointment, purporting such will to be by her signed and published in the presence of and attested by three or more credible witnesses, (and which will, or writing of appointment in nature of a will, Margaret Okeover, notwithstanding her coverture, was thereby empowered to make) should direct or appoint, of or concerning the said premises, or of or concerning any part thereof; and as well for want of such direction or appointment, as in the meantime and until such direction or appointment should be made or given, and likewise subject to any such direction or appointment as should be so at any time made or given, where the same should not be a complete and absolute direction or appointment of the whole of the said premises, or of the whole estate or interest therein, and as, and when any estate or interest therein, or in any part thereof, should respectively end and determine, to the use of Margaret Okeover, her heirs and assigns for ever.

The fine by the said indenture covenanted to be levied, was duly levied in Michaelmas term, 1786.

Edward Walhouse Okeover died many years ago, without leaving any issue by Margaret his wife, and Christiana Bowyer also died many years ago; and, in the year 1797, Margaret Okeover intermarried with, and became the wife of, the Reverend Thomas Langley, clerk, who died in the year 1808, in the lifetime of Margaret Langley, leaving issue by Margaret Langley a son, Thomas Langley, and a daughter, who died an infant in the lifetime of Margaret Langley, and before the making of Margaret Langley's will, hereafter set forth.

Margaret Langley was, at the time of making her will, hereinafter set forth, and from thenceforward down to the time of her death, seized in fee simple, in possession of certain real estates, not comprised in the aforesaid indenture of the 14th October, 1786, and the fine levied in pursuance of the covenant therein contained, which she purchased after the death of Thomas Langley, her husband; but Margaret, at the time of making her will, had no estate or interest in remainder, reversion, or expectancy, other than as hereinbefore and hereinafter appears.

Margaret Langley made an instrument in writing, purporting to be her will, dated 25th August, 1819, and which was signed and published by her, in the presence of, and attested by three credible witnesses, and such will was as follows: "This is the last will and testament of me, Margaret Langley, of Snelstone, in the county of Derby, widow, made this 25th day of August, 1819, in sound and disposing mind, memory, and understanding; first, I will, order, and direct all my just debts, and my funeral and testamentary expenses, to be duly paid, satisfied, and discharged, by my executors hereinafter named; and I give, devise, and bequeath all and every my manors, messuages,

farms, lands, tenements, hereditaments, and real estate whatsoever, whether in possession, reversion, remainder, or expectancy, and all and every my household goods and furniture, and implements of household plate, linen, china, farming stock, both quick and dead, ready money, and money out at interest in the hands of other persons, upon mortgage, bonds, notes, or other securities, and all other my personal estate and effects whatsoever and wheresoever, unto my well beloved and only child, Thomas Langley, to hold the same unto and to the only proper use and behoof of my said child Thomas, his heirs, executors, administrators, and assigns for ever, subject nevertheless to the payment of the following legacies, which I give and bequeath to the under mentioned persons, to be paid at the expiration of twelve calendar months next after my decease, that is to say (here followed several legacies;) provided always nevertheless, and I do hereby declare it to be my will and mind that, in the event of my said son departing this life in my lifetime, without leaving lawful issue, all my real and personal estates and effects hereinbefore given, devised, and bequeathed to him, shall (subject to the legacies hereinbefore mentioned) go, and I do hereby give, devise, and bequeath the same unto and to the only proper use and behoof of my dear sister, Sarah Welch, of Five Ways House, Warwickshire, to her sole and separate use, her receipts standing good for receiving the same, and to her heirs for ever, equally to be divided between and amongst them as tenants in common, and not as joint-tenants, and of their several and respective heirs, executors, administrators, and assigns for ever: and whereas, I am seized of or entitled to various estates in mortgage, or subject to redemption, on payment of certain principal sums advanced by me, upon security of the same, now I give, devise, and bequeath all and every the messuages, lands, tenements, and hereditaments whatsoever, whereof I am so seized or entitled, by way of mortgage, with their and every of their appurtenances, and all my estate and interest therein, to my friend, Thomas Alcock, of Cheadle, his heirs, executors, administrators, and assigns, according to the nature of the said several estates, upon trust, and to the intent that he the said Thomas Alcock, his heirs, executors, administrators, or assigns, do and shall, upon payment unto my executors or administrators, of such sum and sums of money as shall be due and owing upon or in respect of the said several mortgaged premises, convey, assign and assure the same, with the appurtenances, unto or for the person or persons who, at the time of making such respective payment, shall be entitled to the equity of redemption thereof, and to his, her, and their heirs, executors, administrators, or assigns, according to the nature of the said premises respectively; and I do hereby direct that the moneys which shall be received for or in respect of the said several mortgages, shall go and be paid, and applied in the same manner as my other personal estate hereinbefore given and bequeathed; and lastly, I do hereby nominate, constitute, and appoint my friends, Thomas Alcock, of Cheadle, Staffordshire, and James Riddlesden, surgeon, of Ashbourne, executors of this my last will and testament, and guardians of the person and estate of my dear child Thomas Langley, during his minority, hereby revoking and making void all former and other wills

by me made, and declaring this only to be and contain my last. In witness whereof," &c.

Margaret Langley died on the 22d of February, 1821, at Montpellier, in France, leaving Thomas Langley, her only child and heir at law, who died at Montpellier, on the 27th March, 1821, an infant of the age of nineteen years, or thereabouts, intestate, unmarried, and without issue, leaving the Reverend John Langley, the plaintiff, his uncle and heir at law, *ex parte paterna*; and Elizabeth Harrison and Sarah Ellen Evans, two of the defendants, his co-heiresses at law *ex parte materna*.

Parts of the estates whereof Margaret Langley was seized in fee simple in possession, and which she purchased after the death of Thomas Langley, her husband, as aforesaid, and also parts of the estates comprised in the said indenture of the 14th October, 1786, and the said fine, were at the time of Margaret Langley making her will, in lease to various persons for terms of years, and from year to year.

The following questions were submitted for the opinion of the Court.

First. Whether the instrument, dated the 25th August, 1819, executed by the said Margaret Langley, does, as to the estates comprised in the said indenture of the 14th October, 1786, and the said fine, operate at law as an execution of the power of appointment, or as a devise by her by force of her interest.

Second. If the said instrument operates at law as an execution of the said Margaret Langley's power of appointment, did Thomas Langley, her son, take by purchase or by descent?

Third. If the said instrument operates at law as a devise by the said Margaret Langley, by force of her interest, did Thomas Langley, her son, take by purchase or by descent?

Lens, Serjt., for the plaintiff. Margaret Langley disposed of her property by virtue of the power of appointment given her in the deed of 1786, and her son took as a purchaser under this disposition; so that the property will descend to his heirs, *ex parte paterna*. That Margaret Langley acted under the power and not with a view to any interest she might have, independently of the power, must be collected from her intentions, and from the situation in which she was placed. Now, by the deed of 1786, it appears she *consented* and agreed to acquire a control over the property, by means of this power of appointment, which power was then beneficial, as it enabled her to dispose of the property in parts, and during her husband's life; by that deed too, to which she was a party, the remainders over, in default of appointment, are all limited to relations, *ex parte paterna*. Then, if, as is probable, she wished to confer an obligation on her son, that could only be effected under the power of appointment; for his claim as a mere devisee would be merged in his claim as heir at law. Supposing it, therefore, to have been the intention of Margaret Langley, that her son should take under her appointment, it is immaterial whether that appointment was executed by deed or will, and whether the instrument containing the execution of the power, referred to the power in terms

or not. Though the instrument be in form testamentary, it is the intention of the party which must decide whether the instrument shall enure as a will or an appointment. *Cox v. Chamberlain*, 4 Ves. jun. 631. The only case which resembles the present, is *Hurst v. Earl of Winchelsea*, 2 Burr. 880, 1 Bl. 187, but that case has never been acted upon, the lord keeper Henley's decree pursuant to the decision of the King's Bench having been afterwards appealed against.

Peake, Serjt., for the defendants. First, Margaret Langley has made a will and not an appointment; secondly, whether this be so or not, the act she has done is altogether nugatory, so that her son took by descent, and his heirs *ex parte materna* are entitled to the property. Considering the circumstances in which the testatrix stood, originally deriving the property from her father, and at the time of the disposition in question, being possessed of the ultimate remainder in fee, the instrument is as much entitled to the character of a will, as any testamentary disposition made by a party having absolute dominion over property. The only object of investing her with the power of appointment was, that, though a *feme covert*, she might dispose of this property as if she had been a *feme sole*; for had she continued single, the power would probably never have been created. The power did not divest any interest she had before, *Penne v. Peacock*, Cas. Temp. Talb. 41, but only enabled her to do more, than as a *feme covert* she could otherwise have done. Now, where an act is done by one who has an interest as well as a bare power, the act shall always be deemed to have been done in virtue of the interest, and not in virtue of the power, *Clere's case*, 6 Rep. 17, *Cox v. Chamberlain*, *Maundrell v. Maundrell*, 10 Ves. 246. Margaret Langley, therefore, must be taken to have acted in virtue of her own interest in the property, and as she had no motive for resorting to the power, the instrument in question must be deemed a will; if so, the act was nugatory, and her heir takes by his higher title of descent. *Clarke v. Smith*, Com. 72, 1 Salk. 241, S. C., *Allam v. Heber*, 2 Str. 1270, *Hedger v. Row*, 3 Levinz. 127. But even if the instrument were an execution of the power, the act would be equally nugatory, and the heir would take by descent, because, as it has before been shown, an act shall never take effect under a power, where it may also take effect under an interest; and *Hurst v. Earl of Winchelsea* must still be considered as having been decided on the sound rule of law.

Lens, in reply, relied on the supposed intention of Margaret Langley, as expressed by the legacies in *partem paternam*, (though he admitted, that the charge of debts or legacies was not of itself sufficient to break the course of a descent, *Chaplain v. Leroux*, 5 M. & S. 14;) and he urged that, in cases of ambiguity, the law preferred the paternal line. Dougl. 778.

Cur. adv. vult.

The following certificate was afterwards sent:

This case has been argued before us by counsel, we have considered it, and are of opinion,

First, That the instrument dated the 25th August, 1819, executed by the said Margaret Langley, does not, as to the estates comprised in the

said indenture of the 14th October, 1786, and the said fine, operate at law, as an execution of her power of appointment, but as a devise by her by force of her interest.

Secondly, This question does not arise.

Thirdly, We are of opinion, that Thomas Langley, her son, took by descent from his mother, and not by purchase.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

May 14th, 1822.

DARTNALL v. Marquis WELLESLEY.—p. 255.

Where an annuity is sought to be set aside for an illegality in the payment of the consideration, there must be an affidavit of the circumstances from the grantor himself.

PELL, Serjt., on behalf of certain trustees, to whom the marquis had assigned all his property in trust for his creditors, and who were authorized to contest improper claims, moved to set aside an annuity granted by him to Dartnall and others, on a statement by affidavit, in which, from entries in the books of Howard and Gibbs, the sufficiency of the consideration paid was impeached, and the payment was averred to have been made by Howard and Gibbs, and not by Dartnall, &c.; but no affidavit from the marquis being produced, the Court refused to interfere, observing, that the trustees could not state so well, as the grantor, the circumstances of the original transaction, and

Pell took nothing by his motion.

MAYNARD v. BRIGHT.—p. 256.

In C. B., where a defendant under a rule nisi for that purpose files pleas of several matters, annexing to the plea a copy of the rule nisi, endorsed with a notice, that a rule absolute to plead several matters will be served as soon as it is drawn up, the plaintiff may not sign judgment as for want of a plea, if the time for pleading should expire before the rule absolute be obtained.

THE defendant, who was under terms to plead issuably to an action for goods sold and delivered, filed pleas of several matters, (to wit, the general issue and coverture of plaintiff), annexing to the plea, a copy of a rule nisi to plead several matters which had been taken out on the preceding day, and upon which was endorsed, that a rule absolute to plead several matters would be served as soon as it was drawn up; and, on the same day, the defendant acquainted the plaintiff's attorney with these circumstances.

The next day, the time for pleading being out, and the rule absolute for pleading several matters not having been obtained, the plaintiff's attorney signed judgment, on the ground that, till the rule absolute for

pleading several matters had been obtained, the plea filed was a nullity.

Lens, Serjt., having on a former day obtained a rule *nisi* to set aside this judgment for irregularity,

The *Secondary* now informed the Court, that, although there was no decision on the subject, it had always been the practice to consider in such a case, the filing pleas of several matters with the rule *nisi* annexed, endorsed with the notice of a rule absolute, sufficient.

Whereupon the Court set aside the judgment without costs, and said this should be considered as the practice for the future.

Pell, Serjt., showed cause.

Ex parte HAGUE.—p. 257.

Attorney. Striking off the rolls.

PHAKE, Serjt., moved to strike an attorney off the Rolls of this Court, upon the ground that he had some years ago been struck off the Rolls of the Court of King's Bench.

He referred to the rule of Michaelmas, 1654,* by which it is ordered, that attorneys struck off the Rolls of one Court for a misdemeanor, shall not practise in another.

But the Court refused the rule, the contents of the affidavits on which the Court of King's Bench acted, not having been stated, and there being no proof or allegation that the attorney had been struck off for a misdemeanor.

Vaughan, Serjt., showed cause against the rule.

* Rules and orders of the Courts of King's Bench and Common Pleas.

HARSANT *v.* LARKIN.—p. 257.

By the Rochester court of requests act, 22 G. 3, c. 27, debts under 40s., contracted within the jurisdiction of the court, are to be sued for in that court; by 48 G. 3, c. 51, the jurisdiction of the court is extended to sums not exceeding 5*l.*; and plaintiffs suing in the superior courts for sums recoverable under either of the acts, are to be refused costs, notwithstanding a verdict in their favour. But the latter act excludes any jurisdiction over debts being the balance of an account on demand, originally exceeding 5*l.* The plaintiff sued in a superior court for 34*l.* 5*s.* 1*d.*, ascertained by a surveyor, appointed by the defendant and himself, to be due to him for measured work and labour, done within the jurisdiction of the court of requests. The defendant proved payments to the amount of 24*l.* 18*s.*, and the jury estimating the work at only 26*l.*, found for the plaintiff only 1*l.* 2*s.* damages: *Held*, that this was not a case in which the defendant was entitled under 48 G. 3, c. 51, to enter a suggestion to deprive plaintiff of his costs.

THE plaintiff sued the defendant in this Court, and gave in the following particular of his demand.

1821.	Charles Larkin	to John Harsant.
		£. s. d.
May.	Three days' work,	0 12 0
	Measured work,	33 13 1

At the trial of the cause at the last Maidstone assizes, a surveyor, who had been appointed by the defendant and plaintiff to measure the work as between them, said, that on such measurement, he brought the value of the work to 33*l.* 13*s.* 1*d.*

The defendant proved payments on account, to the amount of 24*l.* 18*s.* The jury found a verdict for the plaintiff, and estimated the value of the work at 26*l.*, leaving him thereby 1*l.* 2*s.* for his damages, instead of the balance of 9*l.* 7*s.* 1*d.*

Bosanquet, Serjt., on a former day, upon an affidavit (which stated, that at the time of the commencement of the above action, the defendant was not indebted to the plaintiff in any sum amounting to 40*s.*, and that at the time of the commencement of such action, the defendant was an inhabitant of and resident within the city of Rochester, and liable to be warned and summoned for the debts, on account of which a verdict was given in the said action before the Court of Requests, mentioned in a certain act of parliament of the 22d year of George 3d, intituled an act for the more easy and speedy recovery of small debts within the city of Rochester, and the parishes of Stroud, &c., in the county of Kent; and that such debt was contracted within the city of Rochester aforesaid,) obtained a rule to show cause why the defendant should not enter a suggestion upon the roll, under the 22 G. 3, c. 27, ss. 12, and 32 and 48 G. 3, c. 51, ss. 13 and 14.

By the 12th section of 22 G. 3, c. 27, (the Rochester Court of Requests act,) it is enacted, that debts under 40*s.* contracted within the jurisdiction of the court, are to be sued for in that court;

By the 32d section, "That no action or suit for any debt not amounting to forty shillings, and being upwards of two shillings, and recoverable by virtue of this act in the said Court of Requests, shall be brought against any person residing or inhabiting within the jurisdiction thereof, in any of his majesty's courts of record at Westminster or elsewhere, or in any courts whatsoever, other than in the said Court of Requests, and the Court Portmote thereafter mentioned, and that no suit which shall be commenced in the said Court of Requests in pursuance of this act, nor any proceedings which shall be had therein, shall or may be removed or removable by *certiorari*, or otherwise, into any other court whatsoever, but that the judgment, decrees, and proceedings of the said Court of Requests shall be final and conclusive to all intents and purposes."

By the 48 G. 3, c. 51, s. 1, it is enacted, (after reciting the before-mentioned act, and that it would greatly tend to the improvement and encouragement to the trade of the said city of Rochester, &c., and to the necessary support and protection of useful credit within the same, if the powers of the said act were extended to the recovery of small debts not exceeding 5*l.*.) that so much of the said act as confines or restrains the cognisance or jurisdiction of the Court of Requests for

the said city and parishes to any debt or debts not exceeding the sum of 40s., should from and after the 24th June, 1808, be, and the same is thereby repealed.

By the 13th section it is enacted, "that nothing in this act contained shall extend, or be construed to extend, so as to enable the said commissioners to determine the right or title to any lands, tenements, or hereditaments, or real estates whatsoever, or to judge, determine, or decide, on any debt where the title of the freehold, or lease for years, or lives, of any lands, tenements, or hereditaments, of any chattels real whatsoever, shall be brought or come into question, nor any debt which shall not be for the payment of a sum certain, nor any debt for any sum, *being the balance of an account on demand originally exceeding 5l.*; or to judge, determine, or decide on any debt that shall arise by reason of the occupation of lands, tenements, or hereditaments, situated elsewhere than in the said city or parishes, or one of them; or by reason of any cause concerning testament or matrimony, or anything concerning, or properly belonging to the ecclesiastical court, or for, or concerning any agreement by way of composition, for, or by way of retainer of tithes, or for any matter, or for any matter sueable therein, anything in the said recited acts, or this act, contained to the contrary thereof notwithstanding;"

By section 14th, "If any action or suit shall be commenced in any of his majesty's courts of record at Westminster, for any debt not exceeding the sum of 5l., and recoverable by virtue of the said recited act, and of this act, or either of them, in the said Court of Requests, then and in every such case the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, or otherwise, have, or be entitled to any costs whatsoever."

It was contended, that the present was a case within the 22 G. 3, which indeed contained no provision for entering the desired suggestion; but that it might nevertheless be entered under that act by virtue of the 14th section of 48 G. 3, which expressly referred to cases within the 22 G. 3. Though it was admitted, that if it had been desired to enter the suggestion under the 48 G. 3, the defendant would have been prevented from doing so, by the exception in the 13th section of that act. However, there was no such exception in the 22 G. 3, and *Clark v. Askew*, 8 East, 28, *Horn v. Hughes*, 8 East, 347, and *Bateman v. Smith*, 14 East, 301, all decided that, whatever doubt there may be as to a debt reduced by set-off, a debt reduced by payments or infancy within the sum of 40s. is subject to the provisions of the court of conscience acts; the authority of *M'Collam v. Carr*, 1 B. & P. 223, was doubted in *Clark v. Askew*, and in *Fountain v. Young*, 1 Taunt. 60, there was an exception which took the case out of the act.

Taddy, Serjt., now showed cause against the rule. In *Clark v. Askew* the original demand was on a promissory note, as to the amount of which there could be no dispute. In *Bateman v. Smith*, the defendant was an infant, and, therefore, the greater part of the debt had no existence in contemplation of law; but the claim for which the present plaintiff sues, is not a *debt contracted* within the meaning of the 22

Geo. 3, but a sum due on a *quantum meruit*, about which there might reasonably be a difference of opinion, and which a surveyor appointed by the defendant, found to be quite sufficient in amount to justify the plaintiff's suing in a superior court; and it is within the exceptions of the 13th section of 48 Geo. 3. In *Horn v. Hughes*, Lord ELLENBOROUGH seems to think, that if a plaintiff has a reasonable ground for suing for more than 5*l.*, he ought not to be deprived of his costs.

Bosanquet, in support of his rule, cited, in addition to the cases already mentioned, *Fitzpatrick v. Pickering*, 2 Wills. 68 b, and *Gross v. Fisher*, 3 Wils. 48, to show, that a demand reduced by payments below 40*s.*, was within the spirit of all these acts, and *Benson v. Hemming*, 2 Barnes, 282, 1st ed., 1754, to show, that they were all in *pari materia*, and ought to receive a uniform construction; he urged that the debt mentioned in the statute can only be the sum which the jury ultimately find to be due, and not the sum which the plaintiff has chosen to claim; and that Lord ELLENBOROUGH, in *Horn v. Hughes*, had specified the default of a witness as the only reason for refusing a suggestion.

DALLAS, C. J. I think that this is not a case within the meaning of the statute, and that the proposed suggestion ought not to be entered. It is clear, that, in passing acts of this description, the legislature intended to afford encouragement to poor people, by protecting them against an increase of expense on demands, which may be decided cheaply in the inferior court; therefore, where the original demand is under 40*s.*, the action should be brought in the inferior court, and the party is entitled to a suggestion, if called on for costs in the court above. This is clearly the case, where a simple money demand, originally greater than 40*s.*, has been reduced by payments below that sum. I forbear to enter into the consideration of the case of a money demand, reducible by set-off; but there are many aspects in which the claim of a party to enter a suggestion under the statute may present itself to this court. First, where a demand greater than 40*s.* has been reduced to less than 40*s.* by payments on account; secondly, where it may be reducible by set-off; thirdly, as in the present case, where there is a demand for measured work and labour, and in which it may have been a fair question for a jury to decide what is due. It seems, that in such a case, the jury may, without any imputation on the fairness of the plaintiff's proceedings, find less to be due than the sum actually demanded; and, with a view to the decision on a motion like the present, it must be always a question, whether or no the plaintiff had reasonable and probable cause to litigate such a demand. It is only necessary, therefore, for me to advert to what is laid down by Lord ELLENBOROUGH, in *Horn v. Hughes*. "It is unnecessary to say what we might have thought, if it had appeared that the plaintiff had a reasonable ground for bringing his action for more than 5*l.*, but that from the absence of a witness, or other cause without his default, he had failed in proving his whole demand." This, then, is a case in which that appears which did not appear to Lord ELLENBOROUGH; for what are the facts before the Court; that the

plaintiff performs for the defendant measured work, which, according to an estimate by a surveyor of the defendant's own appointment, amounted to a sum, which, after all the payments, would have left a clear balance of more than 9*l.* due to the plaintiff; and if the defendant refused to pay this, what remedy had the plaintiff but by suing in a superior court? Had not a man who agreed fairly to the valuation of his work a right to sue for the amount which the valuer found to be due? But it has been urged, that Lord ELLENBOROUGH specified the default of a witness as a reason for refusing the suggestion, as if the loss of the requisite verdict, by an unforeseen accident, were the only reason which should exempt the plaintiff from losing his costs. However, it may fairly be presumed, that Lord ELLENBOROUGH mentioned the default of a witness only, as one out of many instances, and that he did not limit the plaintiff's exemption to the case of such an accident. Therefore, without going into the other points, I think there is sufficient on the affidavits before the Court, to enable us to say that the action was properly brought in the Court above, and that there is no ground for entering the proposed suggestion.

PARK, J. I am of the same opinion. In the 48 Geo. 3, c. 51, that act is said to be passed for the recovery of small debts; but when we see by the affidavits, that this is not a small debt, but a demand for more than 34*l.*, depending on measure and valuation, how can we say it is within the statute? the parties agree to an estimate being taken, and more than 9*l.* being due on the balance, there was surely a sufficient reason for resorting to the superior court, and a cause of contest which could not with propriety be submitted to a court of conscience. *Horn v. Hughes* is rather in favour of the plaintiff than against him, according to the language of Lord ELLENBOROUGH.

BURROUGH, J. In all these cases much must be left to the discretion of the Court, upon the facts as they appear in evidence. The intention of the legislature was, that the suggestion as to costs should be applied to cases where there was a clear demand for less than 40*s.*; but if we look at the facts of this case, we can have no doubt that it is not one of that description. Here is a demand for more than 34*l.*, a valuation by consent of both parties, a balance struck, particulars of demand given, and the valuer called; and though, for some reason to us unknown, the jury have found a verdict for less than the balance, I am satisfied, on the merits of this case, that it is not within the act. What Lord ELLENBOROUGH says in *Horn v. Hughes*, about the default of a witness, is only put as an instance, and not as a limitation of the principle laid down by him. There is no ground for the present application; and if it were necessary to go into it more particularly, I should be of opinion that this case falls within the exception of the second act, and does not come under the first.

RICHARDSON, J. If this application rested on the first of the two acts, it ought not to have been reserved for a motion, but to have formed part of the defence on the trial; this has not been done, and the defendant now applies under the 14th section of the last act; but the last act did not mean to give the benefit in such a case. There is

an exception in the 13th section, namely, "for any sum being the balance of an account on demand, originally exceeding 5*l*." And this ought to be borne in mind when we proceed to the 14th section. I think the Court ought not to allow the suggestion here, and the rule must be—
Discharged.

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The ATTORNEY-GENERAL and JOHN MILNE v. WILKINSON and Others.—p. 266.

By a deed of feoffment of 1621, Sir N. S., (in consideration of 100*l*. paid by the feoffees and the other inhabitants of Enfield, and of a free school for ever, to be held for the instruction of children of the inhabitants of Enfield,) granted certain lands to fourteen feoffees, to the intent that they and their heirs should pay 20*l*. a year out of the rents, towards the maintenance of a schoolmaster for such school, and the residue for other purposes, provided that no act concerning the lands or their rents should be done, but in a vestry, or meeting of the feoffees, and ten at least of the inhabitants of Enfield, which should be vestry-men, and not feoffees, in a vestry to be held by them in a chamber over the school, or in the vestry, situate in the parish church, upon public warning, to be given in the church the Sunday before the meeting. Schoolmasters were to be elected in this way, within three months after every vacancy, and were to give a bond to three feoffees to resign the appointment upon half-a-year's warning by the feoffees, or any of them, so it were with the consent and agreement of the feoffees and vestry-men, or the most part of them, which should be assembled in a vestry or meeting, to be held as aforesaid, so always as at least ten of the vestry-men which were not feoffees should vote at the holding of the vestry. Two feoffees were to receive the rents, and account for them the Sunday after the receipt, at a vestry, consisting of the persons before described, and held and convened in the mode before mentioned. When the feoffees should be all dead but five, four, or three, at the least, or gone to live out of the parish, the survivors were to enfeoff fourteen others, of discreet and wealthy men, then inhabitants in the parish, to be chosen by the vestry-men of the parish, or the greater number at a vestry, to be holden in the manner before described: *Held*, that in the execution of the power of removal of the schoolmaster, the votes were to be taken *per capita*, and not according to the provisions of 58 G. 3, c. 59.

THIS case, directed by the Vice-Chancellor for the opinion of the Court of Common Pleas, was as follows.

By an indenture of feoffment of two parts, dated September 1st, 1621, and made between Sir Nicholas Salter, Knt., Nicholas Bainton, and Benjamin Decrow, of the one part, and fourteen feoffees therein named and described, of the other part, Salter, Bainton, and Decrow, as well in consideration of 100*l*. paid by the fourteen feoffees, and the residue of the inhabitants of the town of Enfield in the county of Middlesex, as in consideration of a free school, for ever, to be held for the instruction of the children of the inhabitants of Enfield, granted and confirmed to the fourteen feoffees, certain lands and premises therein particularly described, to have and to hold to them, their heirs and assigns, to the use of them, their heirs and assigns for ever, on condition of performing the intentions expressed in a schedule annexed to the indenture, which schedule, executed by the same parties, and bearing the same date, witnessed, that the intent of the deed of feoffment unto that indenture annexed, was, that the said feoffees and the survivors of them, should from time to time, thenceforth for ever, pay 20*l*. a year of the rents and profits of the lands and tenements mentioned in the deed of feoffment, for and towards the maintenance of a learned, meet, and competent schoolmaster, to keep a

free school, for the teaching and instructing of the children of all the inhabitants of the parish of Enfield, in the new built school there, and should dispose of all the residue thereof, for and towards the relief of poor orphans, and other poor and impotent people of the parish of Enfield, for the time being, and to any other good and charitable uses to be done and performed within the parish of Enfield (except so much thereof as should be sufficient to pay and discharge the quit rents, and all other reprises, together with all such other charges and expenses as should from time to time thenceforth grow to be due and payable), with this intent, meaning, and full agreement between all the parties, that the feoffees and their heirs, and all others who thereafter should be feoffees of the premises, and their heirs for the time being, should not do any act, &c., concerning the lands and tenements contained in the deed of feoffment or the rents, issues, or profits thereof, but in a vestry or meeting of the feoffees, and ten at the least of the inhabitants of the said parish of Enfield for the time being, which should be vestrymen in the said parish, and not feoffees, in a vestry to be held by them in the chamber over the said new built school, or in the vestry situate in the parish church of Enfield, upon public warning to be given thereof in the same parish church, upon the Sunday, in the forenoon, next before such meeting or vestry, the warning to be given immediately after the end of divine service and sermon, if any there should be; and the said parties did, by their mutual and general agreement, choose Richard Ward to be schoolmaster, to teach the children of all the inhabitants of the said parish, being or to be scholars in the said free school, at and for the yearly wages aforesaid, to be paid as aforesaid; and that whensoever the said Richard Ward, or any other who should thereafter be schoolmaster of the said free school, should be dead, avoided, and put away, or departed and gone, there should be, within three months thence next ensuing, one other meet schoolmaster, elected to teach the scholars in the said school, in form aforesaid, so as the said free school should not, at any time thereafter, be unprovided of a meet and competent schoolmaster, by the space of three months together at any one time. And the further intent and meaning of those presents was, that the said Richard Ward, and every other person which should at any time thereafter be elected and appointed to be schoolmaster of the said school, should, before he intermeddled to be schoolmaster, enter into bond unto three of the feoffees for the time being, in such competent sum of money as the said feoffees and vestrymen, or the greater number of them, should appoint, upon condition to depart and give over from being schoolmaster of the said school, and also to yield up in peaceable manner the possession of the house appointed for his habitation in Enfield aforesaid, upon half one year's warning, to be given unto him by the said feoffees, or any of them, so it were with the consent and agreement of the feoffees and vestrymen, or the most part of them for the time being, which should be assembled in a vestry or meeting to be held as aforesaid, so always as there should be, at the least, ten of the vestrymen which should be not feoffees, vote at the holding of the

vestry in which the putting away of any schoolmaster should be determined; and also, that there should be yearly and every year, for ever, by the greater number of the said vestrymen for the time being, in a vestry to be held as aforesaid, two of the said feoffees (for the time being) appointed to be receivers of the rents, issues, and profits of the said premises, and none others, for one year thence next ensuing, which said receivers should not detain or keep the same, or any part thereof, in their or either of their own custody, longer than the Sabbath day next after the receipt thereof, upon which day they should cause warning to be given, of a vestry in form aforesaid, to be held in the afternoon of the same day, at which vestry they should bring with them all such money as they should have received, and so much thereof as they should not then and there disburse and pay away, by and with the consent of the feoffees and vestrymen of the said parish for the time being, or the greater number of them, so as there be present ten at the least of the said vestrymen which should be not feoffees, the said receivers should forthwith lay up in the storehouse of the said parish, &c. Then followed a provision, that if any of the feoffees quitted the parish, they should release their interest to the feoffees who remained there.

And further, also, it was the intent of the said deed, and the agreement of all the parties to those presents, when the feoffees in the said deed of feoffment should be all deceased or gone to dwell out of the parish of Enfield, except five, four, or three of them at the least, then the said five, four, or three so surviving, and inhabiting the parish of Enfield, within one quarter of a year then next following, upon reasonable request and at the costs of the said five, four, or three surviving to be paid out of the revenues of the said premises, should make one other deed of feoffment, by which they should enfeoff fourteen other persons at the least, of discreet and wealthy men, then inhabitants in the said parish, to be elected, nominated, and chosen by the vestrymen of the same parish for the time being, or the greater number of them, at a vestry to be held, upon public warning to be given as aforesaid for the holding thereof, of and in the said lands and tenements, with the appurtenances, in such like manner and form, and to the like intents and purposes in all respects as in the said deed of feoffment and in that schedule were expressed.

Livery of seisin of the several hereditaments and premises comprised in the aforesaid indenture, was duly given to the several feoffees therein named, and the defendants in this suit are the present feoffees of the said charity estates.

In the month of April, 1791, the plaintiff, John Milne, was duly elected and appointed to be master of the said free-school, and upon such appointment he gave a bond to resign that office, as directed by the schedule annexed to the said indenture of feoffment.

The question referred for the opinion of the Judges of this Court was, whether, in the execution of the power of removal given by the said schedule annexed to the said indenture of feoffment, dated the 1st September, 1621, to the feoffees of the charity estates and vestry in

the parish of Enfield, the votes are to be taken *per capita*, or according to the provisions of the act of parliament, passed in the 58th year of the reign of his late majesty, King George the Third, intituled, "An act for the regulation of parish vestries."

Hullock, Serjt., for the plaintiff. The votes are to be taken *per capita*. The 58 Geo. 3, c. 69, applies only to parish vestries, convened for the purpose of regulating the rates, and not to assemblages of trustees, such as those described in the schedule of this conveyance. Those trustees assemble, either under a special usage, or under the provisions of the founder's deed; if under the former, they are excepted by the act; if under the latter, the voting according to the provisions of the act, would have a tendency entirely to alter the property settled by the deed.

Taddy, Serjt., contra. From the language of the deed,—the injunction that the vestrymen should attend,—the circumstances that all the parish is interested in the property conveyed by the deed, and that the consideration moved in part from the parish, it seems to have been intended, that the meetings for the regulation of this property should be parish vestries; if so, they must be regulated by the provisions of the late act; and those provisions would not tend to alter the property, but would merely affect the manner of conducting the meeting. The description of persons to be appointed as feoffees under the deed, are precisely such as would be parish vestrymen. Gibson, 219. 4 Burn's Ecclesiastical Law, tit. Vestry. The special usage mentioned in the act can only refer to a legal usage of the date of Richard the First.

Hullock, in reply. The word vestrymen, in the deed, is only a word of description, as to the sort of persons who should be associated with the feoffees, and affords no indication that the meeting was intended to be a parish vestry. The special usages referred to by acts of parliament, are seldom confined to strict legal customs, but include others generally known, such as husbandry customs, many of which could scarcely have existed at so early a period as the time of Richard the First.

The following certificate was afterwards sent:—

This case has been argued before us by counsel; we have considered it, and are of opinion, that, in the execution of the power of removal given by the schedule annexed to the indenture of feoffment, dated the 1st day of September, 1621, to the feoffees of the charity and vestrymen of the parish of Enfield, the votes are to be taken *per capita*, and not according to the provisions of the act of parliament of the 58th year of the reign of King George the Third, intituled "An act for the regulation of parish vestries."

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

COSTER v. MEREST.—p. 272.

Where it was sworn that hand-bills, reflecting on the plaintiff's character, had been distributed in court, and shown to the jury on the day of trial, the Court would not receive from the jury affidavits in contradiction; and granted a new trial against the defendant, though he denied all knowledge of the hand-bills.

Vaughan, Serjt., had obtained a rule nisi for a new trial in this case, on an affidavit which stated, that hand-bills reflecting on the plaintiff's character, had been distributed in court at the time of the trial, and had been seen by the jury.

Lens, Serjt., who showed cause against the rule, offered affidavits from all the jurymen, that no such placard had been shown to them, and though he admitted, that, in general, affidavits on the subject of the cause could not be received from a jurymen; yet he urged, that as in the present case, no answer could be given to the plaintiff's statement, except by such affidavits, they ought to be received.

But the Court refused to admit the affidavits, thinking it might be of pernicious consequence to receive such affidavits in any case, or to assume that a jury had been unduly influenced; and though the defendant denied all knowledge of the hand-bills, they made the rule

Absolute.

CLARKE and Another v. YEATES.—p. 273.

The defendant, on being arrested, paid under 43 G. 3, c. 46, the debt, and 10*l.* for costs, (which 10*l.* was more than sufficient to cover the costs,) and informed the plaintiff's attorney that he should reclaim only the surplus which might remain after payment of debt and costs; the plaintiff's attorney, on the sheriff's omitting, after request, to remit the money, proceeded in the action, and incurred further costs: *Held*, that the defendant was not liable to pay the costs so incurred after the arrest.

THE defendant being arrested for 54*l.*, on the 1st of October last paid into the hands of the sheriff's officer 64*l.*, under the statute of 43 G. 3, c. 46, s. 2.* The sheriff's officer signed and gave a stamped receipt as follows:—

Clarke and Dimsdale v. Yeates.

Received October 1st, 1821, of Mr. James Yeates, 64*l.* for debt and costs in the above suit.

* By which it is enacted, "That all persons who shall be arrested upon mesne process, within those parts of the United Kingdom of Great Britain and Ireland called England and Ireland, shall be allowed, in lieu of giving bail to the sheriff, to deposit in the hands of the sheriff, by delivering to him or to his under-sheriff, or other officers to be by him appointed for that purpose, the sum endorsed upon the writ, by virtue of the affidavit for holding to bail in that action, together with 10*l.* in addition to such sum, to answer the costs which may accrue or be incurred in such action up to and at the time of the return of the writ; and also such further sum of money, if any, as shall have been paid for the king's fine upon any original writ, and shall thereupon be discharged from such arrest as to the action in which he, she, or they shall so deposit the — — sum endorsed on the writ."

The defendant's attorney then informed the plaintiffs' attorney, that the money was in the hands of the sheriff, and that the defendant did not mean to make any claim, except for the surplus which might remain after payment of debt and costs. The defendant's attorney said the costs would be about 4 or 5*l.*, and they did not amount to more up to the time of the arrest.

The plaintiffs' attorney immediately wrote to the under-sheriff, requiring him to remit the debt and costs to the amount of 60*l.* 6*s.* 7*d.* The under-sheriff omitting to do this, and the money not being paid into Court at or before the return of the writ, the plaintiffs' attorney, on the first day of Michaelmas term, filed a declaration *de bene esse*, and gave notice thereof. In the same term he moved the Court to compel the sheriff to pay in the money, which was done in Hilary term last, when the money was taken out of Court in the usual course. The plaintiffs' attorney having then taxed his costs, which amounted by the allocatur to 30*l.* 10*s.* 6*d.*, demanded of the defendant 24*l.* 3*s.*, in addition to the sum of 64*l.* already paid.

Pell, Serjt., now moved, that all further proceedings in this cause should be stayed, the debt and costs in the action having been paid on the 1st of October, 1821.

Vaughan, Serjt., showed cause in the first instance, contending, that when the sheriff omitted to remit the money, the plaintiffs were obliged, with a view to their own safety, to take the course which had been pursued, and urged that the statute never proposed to make a plaintiff suffer for the sheriff's default.

But the Court thought that, under the statute, the defendant could not be permitted to suffer, after having paid sufficient to cover debt and costs up to the time of his arrest; and they made the

Rule absolute.*

* See Tidd's Practice, p. 281 et seq. 6th edit.

GIDLEY, Executor of HOLLAND, v. Lord PALMERSTON. p. 275.

An action does not lie against a public officer by individuals for sums which, as a public officer, he is authorized to pay them, although he may have received the money applicable to that purpose: *Held*, therefore, that *assumpsit* does not lie against the secretary at war, by a retired clerk of the war office, for his retired allowance, although the secretary at war had received the money applicable to such allowance.

ASSUMPSIT brought by the plaintiff as executor of Christopher Holland, deceased, against the defendant; the first count of the declaration stated, that the said Christopher Holland had been one of the established clerks in the war office, and, before the time of the promise mentioned in the first count of the declaration, had been permitted to retire from such office, and as such retired clerk, had been allowed, and was duly entitled to receive from the public moneys of the united kingdom, the

sum of 200*l.*, in each and every year, as a compensation or retired allowance for his services, as such clerk as aforesaid; that the defendant, at the time of making such promise, was the secretary at war, and, as such, was at the head of the said war office; that the several sums of money necessary for the payment of allowances, or compensations granted as retired allowances, to any person having held any employment in the war office, were, in every year, amongst other sums of money, placed by act of parliament, at the disposal of the secretary at war for the time being, to enable him to defray the charges of such compensations or retired allowances; and it was his duty to pay them over, or permit them to be received by the persons respectively entitled to receive the same; that the sum of 200*l.*, (the retired allowances which Christopher Holland was annually entitled to receive,) had been in the respective years, 1816, 1817, and 1818, (amongst other things,) duly voted and granted by act of parliament, for the due payment of the allowance to the said Christopher, as such retired clerk, and had been, and was in the same years respectively placed by act of parliament, at the disposal of the defendant as the secretary at war, for and during those years respectively; whereupon, it became the duty of the defendant as such secretary at war, in each of the said years, to have paid over, and to have suffered the said Christopher Holland, to receive the said 200*l.* in each of those years. The declaration further stated, that the sum of 600*l.* being due and unpaid, for the amount of the said retired allowance for the three several years aforesaid, the defendant, in consideration thereof, undertook and promised the said Christopher Holland, in his lifetime, to pay over to him, or to permit him to receive the said sum on request, and then averred a breach of the promise; viz. that the defendant would not pay over to Christopher Holland, in his lifetime, nor to the plaintiff as executor since his death, neither would he suffer the said Christopher Holland in his lifetime, nor the plaintiff, as executor since his death, to receive the said sum, but that the same was still wholly unpaid. There were counts in the declaration for money had and received to the use of the testator, and on an account stated. The defendant pleaded the general issue, and upon the trial of the cause before DALLAS, C. J., at the sittings for Middlesex after Hilary term, 1820, a verdict was found for the plaintiff, with 350*l.* 10*s.* damages, subject to the opinion of the court on the following case.

Christopher Holland, the testator, who had been for many years one of the established clerks in the war office, on the 9th of March, 1815, obtained leave to retire from his situation, and upon the recommendation of the secretary at war, and by the authority of the lords commissioners of his majesty's treasury, was placed upon the list of retired established clerks of the war office, with an allowance of 200*l.* a year, commencing from the 3d of the same month of March inclusive, the allowance being granted to him with the due observance of the statute 50 G. 3, c. 117. Holland continued upon such list of retired established clerks from the said 3d of March, until the 25th of August, 1818, when he died. having first made his will, and thereof appointed the plaintiff.

his executor, who, after his death, duly proved the will. The defendant, during the whole of the said period, and at the time of the commencement of this action, was his majesty's secretary at war. The mode in which the compensations or retired allowances granted to the retired clerks, are provided for, is as follows: estimates are drawn up every year, entitled "Estimates of army services," containing separate estimates of all the allowances, compensations and emoluments in the nature of any superannuation or retired allowances, to any persons in respect of their having held any public offices or employments of a civil nature, and prepared agreeably to the act 50 G. 3, c. 117. The estimates are laid before the Commons House of Parliament, and, after having been voted by parliament, the payment of the several sums so voted, are provided for by an act of parliament passed for that purpose. One of the heads of such estimates so laid before, and voted by parliament during the several years of 1815, 1816, 1817, and 1818, was entitled as follows; viz. "Great Britain, for an allowance to the secretary at war, to enable him to defray the charge of compensations or retired allowances to the following persons formerly employed in his office;" one of the items contained under that head is entitled as follows: "To one retired established clerk, 200*l*," and the person to whom that description applied, was the said Christopher Holland. In this manner, the sum of 200*l*. had been regularly included in the sum voted in each of the said years, and the appropriation thereof provided for by an act of parliament, as the compensation or retired allowance of one retired established clerk, during each of those years respectively. The mode in which the money so voted is placed at the disposal of the secretary at war, is as follows. The entire amount of the estimates of army services for the current year is, in the first instance, impressed from the exchequer into the hands of the paymaster-general: there is a warrant issued by the lords of the treasury to the paymaster-general, in the following form: that is to say, "By his Royal Highness, the Prince Regent of the united kingdom of Great Britain and Ireland. G. P. R., Whereas the parliament of the united kingdom of Great Britain and Ireland hath made provision for various services connected with the expenditure of his majesty's land forces for the year 18 , our will and pleasure therefore is, that the accompanying establishments of the said services do accordingly commence, and take place from the 25th day of December, 18 , and continue in force until the 24th day of December, 18 , both days inclusive, and that the amount of each of the said establishments be issued and applied by the paymaster-general of his majesty's forces, at such periods, and in such proportions, as shall from time to time be directed by his majesty's secretary at war, or in case of his majesty's forces serving abroad, by the officer commanding such forces, or by one of the controllers of army accounts, in pursuance of the regulations in this behalf established by us, his majesty's high treasurer, or the commissioners of his majesty's treasury for the time being, or by any act of the legislature; but that no new charge be added thereto, nor any greater sum be issued on account of the said establishments, than is herein authorized

in each particular case, without being first communicated to us, his majesty's high treasurer, or the commissioners of his majesty's treasury for the time." (The warrant here enumerated the various sums authorized to be paid, including an item for the superannuation and retired allowances, and also various deductions not affecting the present case :) and for so doing, this shall be as well to the paymaster-general of the land forces, as to the commissioners for auditing public accounts, the commissary-general of musters, and all other persons whom it doth or may concern, a sufficient warrant, authority and direction Given at our court, at Carlton house, this day of 18 in the year of his majesty's reign. By command of his Royal Highness the Prince Regent, in the name and on the behalf of his majesty.'

Signed by three of the Lords of the treasury.

This warrant is under the royal sign-manual, and countersigned by the lords of the treasury. The secretary at war grants, from time to time, warrants upon the paymaster-general, for the payment of the sums placed by act of parliament at his disposal, which warrants from the secretary at war, are in the following form: viz. "Allowances, compensations, and emoluments, in the nature of superannuation or retired allowances, &c., to persons belonging to the several public departments in Great Britain. Warrant. N. No. To the Right Honourable the Paymaster-General of his Majesty's land forces for the time being. You are hereby authorized and directed, out of such moneys as are in, or shall come to your hands applicable to army services, to issue to Robert Luken, Esq., or his assign, the sum of £ being towards defraying the retired allowances of persons formerly employed in the corresponding department of the war office, for the quarter ending on the 24th the same to be issued without deduction, and without other accompt than such as is liable to be rendered under the authority and direction of the secretary at war.

Signed *Palmerston.*
Given at the war office, this day of 18 ."

"Received day of 18 of the Right Honourable the Paymaster General, the above sum.
Signed *Robert Luken.*"

The paymaster-general, after the receipt of these warrants, draws upon the bank of England for the amount, and such amount is thereupon, by the said Mr. Luken, first clerk to the secretary at war, paid into the bank of Messrs. Biddulph and Cox, the bankers of Mr. Luken, and is entered by them in account with the first clerk of the war office: the money, when so paid, is at the discretion of the secretary at war, no minute of the treasury being necessary to take it out. The said first clerk acts as his cashier in the distribution of it, and the first clerk or his deputy, signs cheques on Messrs. Biddulph and Cox, for the quarterly payments of the said compensations and retired allowances, in favour of the several parties entitled to them, according to the aforesaid

estimates, or as he may be directed by the secretary at war. In this manner, the entire sums voted for the war department, for the years 1815, 1816, 1817, and 1818, have been received by the said Mr. Luken, and by him placed in the hands of Messrs. Biddulph and Cox, upon the account, and for the purposes before mentioned, and the sums retained out of the allowance to Mr. Holland, upon the settlement of the said accounts, have been since paid by the said first clerk, to the account of the paymaster-general at the bank of England. The allowance of 200*l.* per annum was regularly paid to Holland, or to his order, from 3rd March, 1815, to the 24th March, 1816, previously to which time, Holland became embarrassed in his circumstances, and in consequence of certain pecuniary transactions of Holland, the defendant directed that 50*l.* a year only of the retired allowance should be paid to him from the 25th March, 1816, and that the remainder should accrue as a fund for liquidating the claims of certain half-pay officers, widows, and persons on the compassionate list, for whom Holland had acted as agent. Holland remonstrated against this suspension of the retired allowance, and requested the defendant to allow it to be paid to him, and a correspondence took place upon the subject, which was terminated by a letter from the defendant to Holland, dated on the 3rd February, 1817, in which the defendant stated, "that it was quite impossible for him to authorize any issue to Holland, on account of his retired allowance." A commission of bankruptcy was issued against Holland, in April, 1816, under which he was duly declared a bankrupt, and obtained his certificate under the same, in the month of July, in the same year. At the time of the death of Holland, the sum which was retained out of his allowance for the purpose of liquidating the aforesaid claims, after deducting therefrom all the payments which had been made to him or to his order, amounted to 350*l.* 10*s.*, for the recovery of which sum the action was brought.

The question for the opinion of the Court was, whether the plaintiff, as executor of Holland, was entitled to recover the said sum. If the Court should be of that opinion, the verdict was to be entered for the plaintiff for that amount; if not, a verdict was to be entered for the defendant, with liberty for either party to turn the case into a special verdict, if the Court should so think right.

The case was argued in Hilary term last.

Taddy, Serjt., for the plaintiff. The questions are two; 1st, whether the plaintiff's testator had a vested interest in the sum in dispute: 2d, whether, supposing he had such an interest, this action lies against the defendant.

In the estimates, Holland, although not named, is described as certainly as if he had been named. "To one retired established clerk, 200*l.*;" and the case finds that this applies to Holland. The acts of parliament follow the same description; therefore, upon the face of the act* of parliament, and of the estimates, there was this sum applicable to the particular individual. When the estimates are prepared, a demand is made by the secretary at war, of certain sums for certain

* 58 Geo. 3, c. 101.

purposes; the parliament having sanctioned this demand the sums become vested in the individuals to whom they are voted, and if so, the defendant had no right to stop this allowance.

Secondly, this action may be maintained against the defendant; the money has been appropriated by parliament, and has been drawn for by the defendant, under the terms in which it was appropriated; it has been paid to him for a specific purpose, and he is a mere trustee holding a given sum of money for a given individual; so that this plaintiff has the same right as against any other individual, who may hold money for him. But it will be said, that the defendant is secretary at war, and as such officer, no action can be maintained against him. The ground, however, upon which it is contended that public officers are not liable to actions at the suit of private individuals, is of modern introduction, and this case does not fall within that principle. In *Lane v. Cotton*, 1 Ld. R. 646, Lord HOLT thought such an action maintainable, though the other three Judges differed. In *Whitfield v. Lord Le Despencer*, Cowp. 754, the Court held, that an action did not lie against the postmaster-general for the acts of the inferior officer; but, even there, Lord MANSFIELD held, that the postmaster-general would be liable for any act of his own. The present, however, is not the case of an act done by an inferior officer, it is the act of the secretary at war himself, and not an act done in the general duty of his department, or connected with the administration of army affairs.

Vaughan, Serjt., for the defendant. The money sought to be recovered in this action did not constitute a vested interest, but the secretary at war, as a public officer, had a right to control the payment of it. It would be of alarming consequence if this action should be deemed maintainable, for every man described in the act, even the private soldiers of the local militia, might then sue the secretary at war; such actions have always been discountenanced, on the ground of public policy. *Macbeath v. Haldimand*, 1 T. R. 172. The fallacy of the plaintiff's argument consists in his considering the grant as a grant to the individual; but it is not a grant to the individual but to the crown. The terms of the vote of the Commons are, "It is the opinion of this committee that a sum not exceeding £. be granted to his majesty for defraying, &c." The sum is afterwards taken, it is true, with reference to persons who are supposed to be those who will be entitled to it; but it is only a mode of enabling his majesty to pay these allowances so long as he thinks fit. If the person described in the act has acquired a legal vested interest in the sum, should he die a day after the beginning of the year, his executors would be entitled to the whole 200*l.*; but the party here is dependent on the bounty of the crown, and his remedy is by petition to the crown or to parliament. The case expressly finds that the money is at the direction of the secretary at war.

Taddy, in reply. This is the case of an individual, to whom a grant is made of a given sum: where there is a general grant, such as the grants for postage, stationery, &c., the case is different, and no action can be maintained. If persons mentioned by name in these acts must petition the crown for redress of grievances, and the officer through

whom they were to be paid should not be responsible, the alarm would be much more extensive, and the evil much greater than that occasioned to the officer by his own responsibility. If the party should die before the expiration of the year, as there would then be no claimant, the grant would be at an end. But it never can be contended, that a secretary at war is to have the discretion of withholding pensions from those persons who are actually named in the act of parliament.

DALLAS, C. J., after stating the substance of the case, now gave judgment as follows: On these facts the question arises, whether, upon all or any of the counts in the declaration, the present action can be maintained; and we think that it cannot be maintained. It is not pretended that the defendant is to be charged in respect of any express undertaking or agreement between him and the testator, or in respect of any other character than his public and official character of secretary at war.

It is in that character, and in that only, that his duty is alleged to arise; being, therefore, a duty as between him and the crown only, and not resulting from any relation to, or employment by the plaintiff, or under any undertaking in any way to be personally responsible to him. The money received is granted by the crown, subject only to the disposition or control of the defendant, as the agent or officer of the crown, and responsible to the crown for the due execution of the trust or duty so committed. There is, therefore, no duty from which the law can imply a promise to pay to the testator during his life, or to his executor after his death, nor can the money be said to have been had and received to the use of the testator, which money belonged to the crown, being received as the money of the crown, and the party receiving it being responsible to the crown only in his public character. On this view of the case, it appears to us, that this action cannot be maintained.

But it must fail also on another and a wider ground. This is an action brought against the defendant as paymaster-general, for an alleged breach of an implied undertaking, said to attach upon him in that character.

With reference to this ground, it will be sufficient to advert to a class of cases, too well known and established to require to be more particularly mentioned, and which in substance and result, have established, that an action will not lie against a public agent for any thing done by him in his public character or employment, though alleged to be, in the particular instance, a breach of such employment, and constituting a particular personal liability; such persons, said Lord MANSFIELD, in one of the cases cited at the bar, *Macbeth v. Haldimand*, 1 T. R. 172, are not understood personally to contract; and in the same case it was observed, by Mr. Justice ASHURST, "In great questions of policy, we cannot argue from the nature of private agreements."—"Great inconveniences would result from considering a governor or commander as personally responsible."—"No man would accept of any office of trust under government upon such conditions; and indeed, it has frequently been determined, that no individual is answerable for any engagements which he enters into on their behalf. There is no doubt but the crown will do ample justice to the plaintiff's demands,

if they be well founded." Mr. Justice BULLER, in the same case adds, "Where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable;" and in a subsequent case, *Unwin v. Wolsely*, 1 T. R. 674, it is held that a servant of the crown, contracting on the part of government, is not personally answerable. I am aware, that these cases are not, in their circumstances, precisely similar to the present; and perhaps, in respect of some of the circumstances belonging to the present case, I may personally have doubted longer, than, I am now satisfied, I ought to have done; but in their doctrine, they go to this, that, on principles of public policy, an action will not lie against persons acting in a public character and situation, which, from their very nature, would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved: and though it is to be presumed that actions improperly brought would fail, and it may be said that actions properly brought should succeed; yet, the very liability to an unlimited multiplicity of suits, would in all probability, prevent any proper or prudent person from accepting a public situation at the hazard of such a peril to himself.

It is scarcely necessary to add, even to guard against any possible misconception, that the noble Lord who is the defendant on this record, appears, in point of fact, to have acted upon the purest motives of public and private justice to all parties concerned.

Upon the grounds which I have stated we are of opinion, that this action cannot be maintained, and that the judgment, therefore, must be for the defendant.

Judgment for the defendant accordingly

KINE v. BEAUMONT.—p. 288.

The copy of an original letter giving notice of the dishonour of a bill, is admissible in evidence, without notice to produce the original letter.

ACTION by the endorsee of a bill of exchange against the endorser. At the trial, before DALLAS, C. J., London sittings after last term, the plaintiff offered to prove the notice of dishonour of the bill, (which notice had been given in a letter,) by a copy of the letter, taken at the time it was written; but did not prove any notice to the defendant to produce that letter.

It was objected, that a copy of the letter ought not to be allowed in evidence, till it was proved that the defendant had received notice to produce the original letter. A verdict was found for the plaintiff, with leave for the defendant to move to set it aside and enter a nonsuit, if this objection should be thought well founded.

Bosanquet, Serjt., on a former day, obtained a rule *nisi* accordingly, relying principally on *Shaw v. Markham*, Peake, N. P. C. 165 and *Langdon v. Hulls*, 5 Esp. 156; and citing *Grove v. Ware*, 2

Starkie, N. P. C. 174, to show that Lord ELLENBOROUGH's later opinion coincided with that expressed by himself and Lord KENYON in the former cases.

Lens, Serjt., who, on a subsequent day, showed cause against the motion, argued that, whatever might have been the rule formerly, the notice of the dishonour of a bill, was, as to evidence, now placed on the same footing as notices to quit, &c. For this he cited *Ackland v. Pearce*, 2 Camp. 601, and *Roberts v. Bradshaw*, 1 Starkie, N. P. C. 28, in which cases Lord ELLENBOROUGH seemed to have changed his former opinions on the subject. [PARK, J. *Roberts v. Bradshaw* was not merely a *nisi prius* decision. There was subsequently an application for a new trial, which the Court refused. BURROUGH, J. There was also a motion for a new trial, in *Ackland v. Pearce*, but without success.] *Lens* further urged, that the objections made to the admissibility of the copy in this case would apply equally against the practice in cases of notice to quit and notices of actions against magistrates; and further, that, in all cases of notice, copies made at the time were a species of duplicate original, which had always been held admissible. *Jory v. Orchard*, 2 B. & P. 39, *Anderson v. May*, 2 B. & P. 237.

Bosanquet, in support of his rule. Neither a notice to quit nor a notice of action to a magistrate can be proved by a copy, where no notice has been given to produce the original notice, except in cases where the notice served was one of two duplicate originals, drawn out and signed at the same time and by the same hand. This was the ground of the decisions in *Jory v. Orchard*, *Anderson v. May*, *Gotlieb v. Danvers*, 1 Esp. 455, *Surtees v. Hubbard*, 4 Esp. 203, *Philips v. Chase*, 2 Campb. 110; and forms the distinction to which the decisions by Lord ELLENBOROUGH seem always to have reference. In *Surtees v. Hubbard* he refers to the case of a notice to quit, and of such notices duplicate originals are usually made; but no case has decided that a copy of a notice to quit, where duplicate originals have not been drawn out, can be given in evidence, without proving notice to produce the notice served. *Ackland v. Pearce* and *Roberts v. Bradshaw* have not gone further than the preceding cases. In *Ackland v. Pearce* it does not appear that the notice served was not one of two duplicate originals, nor that the secondary evidence, which LE BLANC, J., said might be admitted, was not the other; but as the analogy of a notice to quit was referred to, it may be presumed the notice in question was one of two duplicates. In *Roberts v. Bradshaw* the clerk received from his master two papers exactly alike, which the clerk compared with each other, and produced one of them, purporting to be notice of dishonour of the bill then in question; and the language of Lord ELLENBOROUGH, taken with reference to that fact, consists with his former opinion. The copy produced in the present case is not a duplicate original drawn out or signed by the same hand, but a mere copy, and it would be contrary to all principle to admit it, without first calling for the original.

DALLAS, C. J. It appeared to me at the trial, that the objection there taken, and now supported, was well founded. So I thought originally; so Lord ELLENBOROUGH thought at one time; so Lord KENYON thought.

But, at the suggestion of counsel, and on a reference made to some of the later cases, a verdict was taken for the plaintiff, and I saved the point for the opinion of this Court.

In the case of *Roberts v. Bradshaw*, Lord ELLENBOROUGH expressly says, that a letter acquainting a party with the dishonour of a bill, is in the nature of a notice, and that it is unnecessary to prove notice to produce such a letter. I own I do not see any great inconvenience which can arise, in practice, from giving notice to produce such a letter; but still the question comes to this, whether, in substance and reason, the law is not by the late determination settled, that where a copy of a letter, containing notice of dishonour of a bill of exchange is tendered in evidence, such copy is admissible, without proving a notice to the party in whose possession the letter itself may be, to produce it.

I am not now going to enter into nice distinctions between a copy and a duplicate original; though I cannot see any great difference between a duplicate original and a copy made at the time; but, feeling the necessity that there should be a uniformity in the practice of the Courts, we will inquire what the practice of the Court of King's Bench is on like occasions.

On this ground only we delay giving our judgment.

PARK, J. In a suit against the acceptor of a bill, I do not see any inconvenience which can arise from admitting in evidence, the copy of the letter containing the notice of dishonour, without proof of notice to produce the original.

BURROUGH, J. I can see no substantial distinction between a duplicate original and a copy made at the time.

RICHARDSON, J. At present, I own I do not see any sound distinction between a duplicate original and a copy authenticated on oath.

Adjournatur.

And now,

DALLAS, C. J., said, In this case we see no reason to change the opinion we in part expressed when the question was last before the Court; but, as a matter of general practice, we wished to collect the opinion of other Judges, and the result is, that the copy of an original letter, giving notice of the dishonour of a bill, is admissible, without notice to produce the original letter, and, consequently that, in this case, the verdict must stand, and the rule to enter a nonsuit be

Discharged

* See Phillip's Evidence, vol. i. 448, 5th edit.

LUPES v. DE TASTET.—p. 292.

In an action on the case against an agent for misfeasance, the declaration, in addition to the counts on the misfeasance, contained two counts in trover, with an allegation of special damage. The plaintiff failed in substantiating the counts for misfeasance, or the allegations of special damage, but recovered on the bare count in trover: *Held*, that he was entitled only to the costs of, and occasioned by, that count, divested of the special damage-allegation; but that he was entitled to a sum paid for the postage of foreign letters, sworn to be solely applicable to the cause.

No costs are allowed for the loss of a broker's time.

No costs are allowed for a witness who has not been paid before the claim is made.

THIS was an action on the case, brought against the defendant for misfeasance, in his capacity of an agent. In addition to the counts containing the statement of this misfeasance, there were two counts in trover, with allegations of special damage. At the trial, before DALLAS, C. J., London sittings after Trinity term, 1819, the plaintiff attempted to substantiate, but failed altogether on the counts for the misfeasance, and in the proof of the alleged special damage, but obtained a verdict on the bare count in trover.

The prothonotary, in taxing costs, allowed, among other items, sixteen guineas for the loss of time of sixteen brokers, who attended as witnesses, but acting on the principle laid down in *Penson v. Lee*, 2 B. & P. 330, (that where a party declares in several counts, and recovers only on a part of his declaration, he shall be allowed costs only for the part on which he recovers) he confined the costs to the part of the count in trover on which the plaintiff had recovered, refusing to allow them on the counts for misfeasance, the allegations of special damage, or for any expenses occasioned in the endeavour to substantiate those counts or allegations. A sum of 500*l.*, charged for one of the witnesses on the count in trover, he refused to allow, because it had not been actually paid to the witness; and also the sum of 396*l.* 16*s.*, charged by the plaintiff for the postage of foreign letters, sixteen guineas of which sum were sworn to have been paid for the postage of foreign letters solely applicable to this cause.

Both parties obtained rules nisi for the prothonotary to review his taxation. The plaintiff, on the ground, among other objections, that the allowance ought to have been made on the whole declaration, when it appeared that the whole was *bona fide*, framed with a view to trial, and witnesses attended in support of every part; that, at all events, costs ought to have been allowed for the expenses incurred in support of the allegation of special damage; that the rule in *Penson v. Lee*, which applied to different counts, had never been extended to different parts of the same count; that before a party paid a witness 500*l.*, he was entitled to know what the prothonotary would allow; and that the sum paid for postage of the foreign letters applicable to the cause ought to have been allowed.

One of the defendant's objections, was to the allowance for the time of the brokers who attended as witnesses, it being contended that such an allowance could only be made to medical men or solicitors, *Severn v. Olive*, Ante, 353; *Willis v. Peckham*, Ante, i. 515; *Moor v. Adam*, 5 M. & S. 156.

Cur. adv. vult.

And now the Court confirmed the rule in *Penson v. Lee*, and the prothonotary's taxation, as to the refusal to allow costs on any part of the proceedings but the bare count in trover, and the evidence thereon, and as to the refusal to allow for the witness who had not been paid. But they disallowed the sum taxed for the loss of time of the brokers, deciding that no allowance ought to be made for their loss of time; and without laying down any general rule, directed that, in this case, the sum sworn to have been paid for the postage of foreign letters solely applicable to the cause, should be allowed.

Lens and *Hullock*, Serjts., for the plaintiff; *Vaughan* and *Bosanquet*, Serjts., for the defendant.

PADFIELD v. BRINE.—p. 294.

Under an execution by A. against B., the Court will not order the sheriff to pay over money in his hands, levied on an execution by B. against C.

PADFIELD had recovered heavy damages in an action against Brine. Brine had recovered damages against Hippisley, and the sheriff had in his hands the sum of 533*l.* 8*s.* 5*d.*, being the proceeds obtained by the sheriff under the act of *feri facias*, issued out of this court in the cause of *Brine v. Hippisley*.

A *feri facias* having then been delivered to the sheriff in the cause of *Padfield v. Brine*,

Lens, Serjt., on a former day, obtained a rule to show cause why the sheriff should not be ordered to retain in his hands the sum above mentioned for the use of the plaintiff, Padfield; and he cited *Armistead v. Philpot*, Doug. 231.

Pell, Serjt., in showing cause, said that *Fieldhouse v. Croft*, 4 East, 510; *Knight v. Criddle*, 9 East, 48, were direct authorities against such an application, and no answer being given to this, the rule was discharged, but without costs.

Rule discharged.

CHAMPION and Another v. TERRY.—p. 295.

Defendant being indebted to plaintiff for goods sold, gave him a bill of exchange, not due (drawn and accepted by two other persons,) to a greater amount than the price of the goods, and plaintiff gave defendant the difference in money. Defendant endorsed the bill in blank. Plaintiff having lost the bill before it was paid, *Held*, that he could not sue the defendant for the price of the goods, or on the lost bill.

ACTION on a bill of exchange, and for goods sold and delivered. At the trial before DALLAS, C. J., it appeared that the defendant, who had bought goods of the plaintiff, when called on for payment, gave the

plaintiff's agent a bill of exchange, drawn and accepted by two other persons, but not due, for an amount greater than the price of the goods; and that the agent, thereupon, gave the defendant, in money, the difference between the amount of the bill and the price of the goods: the defendant endorsed the bill in blank.

The plaintiff afterwards, and before the bill became due, transmitted it with several others in a letter which never reached its destination, and the bills were seen no more; whereupon, as soon as the time had elapsed, by which the bill in question would have become due, the plaintiff brought this action. It did not appear that any inquiry had been made for the bill, or that there had been any advertisement of the loss. The jury found a verdict for the defendant.

Vaughan, Serjt., on a former day obtained a rule *nisi* for a new trial, or to enter a verdict for the plaintiff, which he moved for, on the ground that the bill had not been received absolutely in payment and discharge of the plaintiffs' demand, but only conditionally, provided the amount of it should actually come to hand.

Pell, Serjt., now showed cause. As to the count for goods sold, the defendant, it must be presumed, gave value for this bill; the plaintiff, therefore, who has put it out of the defendant's power to recover that value again, shall not make him pay twice for the same goods. As to the count on the bill, the plaintiff cannot recover unless he produces the bill, or proves that it has been lost; this was always the law with respect to actions against acceptors, and in *Powell v. Roach*, 6 Esp. 76, there is the same decision with respect to endorsers. No evidence was given in the present case of the absolute loss or destruction of the bill, and for aught that appeared at the trial the plaintiff might be sued tomorrow by a holder who had given value, and so, if cast in this action, pay for the same instrument three times.

Vaughan, in support of his rule, urged, that proof of the non-arrival of the bill within a reasonable time was sufficient proof of the loss of it, and he referred to *Long v. Bailie*, 2 Camp. 214, n.

The Court seemed to think that there was not sufficient proof of the loss of the bill; but that, at all events, the plaintiff having taken a bill, by losing which, he had deprived the defendant of all means of recovering over, he should not turn round and sue the defendant for goods which had already cost him their full value. They referred in the course of the argument to *Davis v. Dodd*, 4 Taunt. 602; *Dangerfield v. Wilby*, 4 Esp. 159, and *Ex parte Greenway*, 6 Ves. jun. 812, and observed, that in *Long v. Bailie* the bill was specially endorsed.

Rule discharged.*

* See 2 Campb. 211, *et seq.* *Mayor v. Johnson*, 3 Campb. 324; *Poole v. Smith*, Holt, N. P. C. 144; *Mossop v. Eadon*, 18 Ves. jun. 430. See also *Williamson v. Clements*, 1 Taunt. 523

(IN THE EXCHEQUER CHAMBER.)

CLEMENT v. LEWIS, Gent., (in Error.)—p. 297.

Where an account of certain proceedings in a court of law was headed in a newspaper, "Shameful conduct of an attorney," pleas to a declaration in libel, that the alleged libel contained a faithful and true account of proceedings in a court of law, were held ill.

The jury having found for the defendant on six out of eight pleas comprehended in the last of two issues, and for the plaintiff on the residue of those pleas, and on the first issue without assessing damages; and the plaintiff having, pursuant to the decision of the Court of K. B., entered up as to the pleas found for the defendant, judgment *non obstante veredicto*, with an award of a writ of enquiry, and final judgment for the damages found by the inquisition, &c.: a court of error reversed the judgment of the Court of K. B.; as to the award of the writ of enquiry, and the final judgment thereon—remitted the record to the Court of K. B.—and directed that Court to award a *venire de novo* to try the first issue and the last, as far as related to the pleas on which the finding was for the plaintiff; holding, that the verdict found for the plaintiff on the first issue, and on the last, (as far as regarded the pleas on which the finding was for the plaintiff,) was void, because no damages had been assessed.

LEWIS sued Clement in the King's Bench, for a libel in the Observer newspaper, headed "Shameful Conduct of an Attorney." Pleas, first, general issue, and issue thereon; and then eight special pleas, justifying on the ground, that the alleged libel contained a faithful and true account of the several proceedings therein stated, had in the Insolvent Debtor's Court, and issue on those pleas. The jury, at the trial, found a verdict for the plaintiff on the first issue, and on the last as far as related to the second and sixth pleas, without assessing damages; and for the defendant on the last issue as far as it related to the third, fourth, fifth, seventh and eighth pleas. The Court of King's Bench, on a motion to enter up judgment for the plaintiff, *non obstante veredicto*, decided that the pleas were ill, because the words at the head of the libel formed no part of the proceedings in the Insolvent Debtors' Court,—gave judgment for the plaintiff, see 3 B. & A. 602, *et seq.*—awarded a writ of inquiry to assess the damages, and judgment was thereon entered up for 500*l.* damages, and 40*s.* costs, (the sum assessed,) and 656*l.* for cost of increase.

The defendant brought a writ of error in *Cam. Scacch.*, and assigned for errors, that judgment was entered up *non obstante veredicto*: and common error.

Joinder in error.

PLATT, for the plaintiff in error, contended, that the heading of the libel imputed no misconduct beyond that which was developed in the ensuing statement: and that the finding of the jury had in effect thrown the heading out of the account.

But on this point the Court affirmed the judgment of the Court below.

PLATT then objected that the verdict was void, because the jury had not assessed damages on the issues found for the plaintiff, that the Court below ought, therefore, to have awarded a *venire de novo* instead of a writ of inquiry, the rule being, that when the court *ex officio* ought to inquire of any thing upon which no attain lies, there the omission may

be supplied by a writ of inquiry ; but in all cases, when any point is omitted whereof attaint lies, it shall not be supplied by a writ of inquiry of damages, but by a *venire de novo* ; that attaint would have lain against the original jury in the present case, of the benefit of which the defendant would be deprived if he were concluded by the finding of an inquisition on which no attaint lies ; he cited Comyn's Dig. tit. Damages, E. Cheyney's case, 3d Resolution ; 10 Rep. 119, a ; Haydon's case, 11 Rep. 6, a ; *Eichorn v. Le'maitre*, 2 Wils. 367, and *Kirk v. Nowill* 1 T. R. 118, 266.

Marryatt, for the defendant in error. It may be true, that where the first jury omits something which it ought to have found, the Court cannot *ex officio* ascertain by a writ of inquiry what has been omitted. In all the cases cited, the verdict having passed for the plaintiff, the jury omitted something which they might and ought to have found ; but neither those cases, nor the principle justly laid down, are applicable to the present case, where the verdict having passed for the defendant on an issue going to the whole declaration, the jury had no power to find damages for the plaintiff ; and therefore, have omitted nothing.

[*Per Curiam*, they may find for a defendant on special pleas, and damages for the plaintiff under the general issue. *Sayre v. Earl of Rochford*, 2 W. Bl. 1165 ; *Kirk v. Nowill*, and this is not unusual.]

Then, the reason for not awarding a writ of inquiry, namely, that the defendant may thereby be deprived of his attaint, can scarcely be urged with effect at this day, when the writ of attaint has been obsolete for nearly two centuries. However, if it were otherwise, a writ of attaint would not have lain in this case, for the jury could only have erred in the amount of the damages, and for excess or insufficiency of damages, a writ of attaint does not lie. *Barker v. Sir Wolston Dixie*, 2 Str. 1051. Where there is a verdict on an immaterial issue, or on an issue ill joined after a justification, the Court will award a new writ to inquire of damages, *Lucy v. Reynolds*, Cro. El. 214 ; 2 Roll. Abr. 99, D.

Jones v. Bodinham, 1 Salk. 173, Carthew, 370, S. C. ; *Staple v. Haydon*, Ibid. ; *Broome v. Rice*, 2 Str. 873 ; *Broadbent v. Wilks*, Willes 364 ; *Darrose v. Newbott*, Cro. Car. 143 ; *Knight v. Lillo*, 2 Wils 81 ; *Craven v. Hanley*, 2 Com. Rep. 548 ; *Lucena v. Crawford*, 2 N. R. 329 ; 2 Roll. Abr. 722, were also referred to for the purpose of showing that the Court had been in the habit of awarding writs of inquiry in cases similar to the present ; but they were distinguished by the Court, or shown not to apply.

The following judgment was entered up by order of the Court.

It appears, that notwithstanding the verdict found for the defendant, still the plaintiff ought to recover damages.

But it further appears to the Court, that the jury by whom the issues were tried, ought to have assessed the plaintiff's damages, by reason of the grievances contained in the declaration : and by reason of their not having assessed such damages, the verdict for the plaintiff on the

first and last issues, so far as relates to the second and sixth pleas, is void in law.

It further appears, that in the record and proceedings, &c., there is error, in this, that the Court of King's Bench have awarded a writ of inquiry, and proceeded to final judgment thereupon; therefore, it is considered that the verdict and the inquisition of damages be annulled and vacated, and the final judgment in the King's Bench be reversed,—that the record be remitted to the Court of King's Bench,—and that the same Court do anew command the sheriff to cause a jury to come, &c., to try the first issue, and the said other issue, so far as relates to the second and sixth pleas.

MORRIS v. MAGRATH.—p. 301.

Plaintiff having omitted three terms after judgment to charge in custody defendant, who, after judgment, had surrendered in discharge of his bail; *Held*, that defendant was supersedeable, although, in the meantime, he had removed himself into another custody by *habeas corpus* in another action.

In this case judgment was signed in Easter term, 1821. On the 3rd of July following, the defendant surrendered in discharge of his bail, when no further proceedings were had in the cause till Hilary term, 1822: the plaintiff then (the defendant having previously removed himself by *habeas corpus*, in another cause, into the prison of the King's Bench) issued a *habeas corpus*, and on the 12th February, charged the defendant in execution.

Luwes, Serjt., obtained a rule *nisi* for a writ of *supersedeas* to discharge the defendant out of custody, on the ground that he ought to have been charged before the end of Michaelmas term. *Heaton v. Wittaker*, 4 East, 349; *Line v. Lowe*, 7 East, 330.

Vaughan, Serjt., who showed cause against the rule, contended, that the defendant ought to have applied sooner, and that the rule that a party who was once supersedeable, was always supersedeable, was confined to cases where the party remained in the same custody and under the same process, *Rose v. Christfield*, 1 T. R. 591; here he had removed himself by *habeas corpus* in another action.

Luwes, in support of his rule, argued, that the defendant having surrendered in discharge of his bail, after judgment, must be deemed to be still in custody under the same process, although he was also in custody under another action; and

The Court being of this opinion, the rule was made

Absolute

CALDER v. RUTHERFORD and Others.—p. 302.

In an action on an agreement to pay 100*l.* if plaintiff would not send herrings for one twelve month to the London market, and, in particular, to the house of J. and A. M. The plaintiff proved he had sent no herrings during the twelve months to the house of J. and A. M.: *Held* sufficient to entitle him to recover, no proof being given that he had sent herrings within that time to the London market.

Where A., partner with B., signed an agreement on behalf of the house of A. and B., and B. survived A.: *Held*, that an action on the agreement lay against the executors of the survivor only.

ACTION against the executors of James Stuart, the survivor of two partners, on the breach of an agreement, signed by Gabriel, for the house of James and Gabriel Stuart, to pay 100*l.* if the plaintiff would not consign, for one year, directly or indirectly, any quantity of repacked herrings to the London market, made up for the West India market; and, in particular, to the house of Messrs. J. and A. Millar.

At the trial before DALLAS, C. J., London sittings, after Hilary term last, the plaintiff proved that he did not consign, for the space of one year from the date of the agreement, any repacked herrings to the house of J. and A. Millar. For the defendant it was objected, that the plaintiff's proof was insufficient, and that he should have called his clerk to show that no herrings were consigned to the London market generally.

A verdict was found for the plaintiff, with liberty for the defendant to move to set it aside, and enter a nonsuit.

Vaughan, Serjt., accordingly, having obtained a rule *nisi* on the above objection, and also on another, viz. that the action ought to have been brought against the executors of both the partners, and not singly against the executors of the survivor.

Taddy, Serjt., in opposing the rule, urged that the plaintiff had made out a sufficient *prima facie* case, by adducing some evidence that applied to the terms of the agreement, namely, by showing that he had sent no herrings to J. and A. Millar; that, after this, he could not proceed further in the proof of a negative, but that the defendant should, if he could, have proved the affirmative of the issue: and that a party could only be called on to prove a negative to its full extent, where the omission of the act required to be done, would be a criminal neglect of duty, *Williams v. East India Company*, 3 East, 192. As to the objection respecting the non-joinder of the executor of the other party, *Richards v. Heather*, 1 B. & A. 29, was an express authority to show that the action was well brought against the executors of the survivor.

Vaughan, in support of his rule. The doctrine laid down in *Williams v. East India Company*, is not confined to negative averments imputatory of criminal neglect of duty; but where there is a negative averment, the issue shall be proved by the party who can prove it with the least inconvenience; as the plaintiff might have done here by calling his own clerk.

DALLAS, C. J. It is not necessary for us to lay down any rule, or draw any distinction in this case as to negative or affirmative averments. Generally speaking, the rule is, that the affirmative of the issue must be proved, and the case of *Williams v. East India Company* is

an exception. But here some evidence was given in proof of the negative averment, and that threw it on the other party to go further.

PARK, J. The evidence given by the plaintiff, though vague, was enough to throw it on the other party to go further. On both points, I agree with my brother *Taddy*.

The rest of the Court concurring, the rule was

Discharged.

PAYNE v. BAILEY.—p. 304.

Plaintiff obtained a verdict subject to the award of an arbitrator. The arbitrator having made a material mistake in his award, and the defendant having refused to refer matters back, this Court set aside the verdict, and discharged the rule for reference. The plaintiff took the cause down to trial a second time, and a second time obtained a verdict.

Held, that he was entitled to the costs of both trials.

THIS was an action brought against the defendant, as surety on the joint and several bond of the defendant, and Richard Lough, the principal, and John Selby the other surety, which was dated 27th February, 1819, and was taken in the penal sum of 4000*l.* for securing the payment of the three several acceptances of the said Richard Lough, therein mentioned, being the capital sum due to the plaintiff from the said Richard Lough, on the dissolution of a co-partnership, one of which acceptances, for the sum of 766*l.* 9*s.* 1*d.*, was payable two months from the date of the said bond, and this action was brought to enforce the payment of the said instalment, the others not being then due.

The defendant pleaded, first, the general issue; secondly, that the bond was obtained by fraud, covin and misrepresentation by the plaintiff, and certain other persons in collusion with the plaintiff; and lastly, that the bond was obtained by fraud, covin and misrepresentation; upon which several pleas issues were joined.

The cause came on for trial at Guildhall, London, before DALLAS, C. J., and a special jury (obtained at the defendant's instance) on the 2d July, 1819, when, after the defendant's case had been partly gone into, a general reference to a barrister was suggested, which was acceded to by the counsel for the plaintiff and defendant, and it was thereupon ordered by the Court, with the consent of all parties, that a verdict should be entered for the plaintiff, for 4000*l.* debt, and 1*s.* damages, subject to the award of a barrister, to whom all matters in difference between the parties were referred, and it was also ordered, that the costs of the suit, to be taxed, should abide the event of the award, and that the costs of the reference and award, and of the special jury to be taxed, should be in the discretion of the arbitrator.

The reference was proceeded in, and the plaintiff, in addition to the sum of 766*l.* 9*s.* 1*d.*, for which this action was brought, claimed before the arbitrator the remaining instalments on the bond, amounting together to the sum of 2337*l.*, exclusive of interest thereon, under, or by virtue of the principal bond, together with the sum of 122*l.* under

and by virtue of another bond, entered into by the defendant and the said two other persons, to indemnify the plaintiff against sundry co-partnership debts which were to be paid by Richard Lough, the plaintiff having been called upon to pay, and having paid that sum, one moiety of which, being 61*l.*, the plaintiff claimed from the defendant as one of the sureties under the bond of indemnity, in addition to one moiety of the principal and interest under the principal bond before mentioned, the liability of each surety on both the bonds being limited to one moiety of the amount of the sums thereby respectively secured.

The arbitrator made and published his award in writing, pursuant to the order of reference, and hereby found each of the issues joined between the parties for the plaintiff; and the arbitrator awarded and directed that a verdict should be finally entered for the plaintiff for 61*l.* debt, and 1*s.* damages, and that the costs and charges of his award should be paid by the parties in equal proportions, and that each of the parties should bear his own share of the remaining costs and charges of the reference, and that the cause was a proper cause to be tried by a special jury.

The arbitrator, through mistake or error, altogether omitted the instalments and sums secured by the principal bond; and having directed a verdict to be entered for the plaintiff in this action for one moiety of the sum claimed under the bond of indemnity only, and the plaintiff, being dissatisfied with such award, caused an application to be made to the Court, that it might be referred back to the arbitrator to reconsider his award, upon which application the Court granted a rule to show cause.

Upon cause being shown the Court was of opinion, that it had no authority to make the rule absolute, unless the defendant consented thereto, which he refused: but at the instance and request of the plaintiff's counsel, the Court thereupon ordered that the rule or order of reference should be discharged, and that the verdict entered for the plaintiff, subject to the award as aforesaid, together with the award, should severally be set aside.

The plaintiff afterward gave notice of trial, and the cause again proceeded to trial on the original proceedings, at the sittings after Michaelmas term, 1820, when a verdict was found for the plaintiff.

Upon application to the prothonotary by the plaintiff to tax the plaintiff's costs upon the *postea*, the prothonotary refused to allow to the plaintiff the costs of the original trial on which the reference was made, the arbitrator's award having been set aside at the instance of the plaintiff, as before stated.

Hullock, Serjt., on a former day, moved for the prothonotary to review his taxation, and stated the rule to be, that in all cases where a cause is taken down to trial, and goes off, without the fault, contrivance, or management of the parties, and is afterwards brought again to trial, the costs of the former abortive trial shall be taxed and allowed to the party finally prevailing, in the same manner as if the cause had gone

off on a *remanet*; *Burchall v. Bellamy*, 5 Burr. 2693; or, as if an award had been set aside; *Poole v. Selwood*, 1 Price, 310. He urged, that the mistake of the arbitrator was no fault, contrivance, or management of the plaintiff, and that *Poole v. Selwood* was in point.

Vaughan, Serjt., *contra*. The rule is, that a party is not entitled to the costs of proceedings which have been rendered abortive by his own act. It was the plaintiff who set aside this award in his own favour; and it was, therefore, by his management that the cause went down to trial a second time, which distinguishes the case from that of *Poole v. Selwood*, where the defendant set aside the award, and thereby rendered it necessary for the plaintiff to proceed further. No new trial has been granted by the Court in the present instance; nor, as in the case of a *remanet*, has a second proceeding become necessary through the act of the Court; but the cause is more like one in which a case has been reserved for the opinion of the Court, and has been insufficiently stated, or where an insufficient verdict has been found. *Worcestershire Canal Company v. The Trent Navigation Company*, 2 Marsh. 475; *Lickbarrow v. Mason*, 6 T. R. 131; *Smith v. Haile*, 6 T. R. 71; *Hankey v. Smith*, 3 T. R. 507; *Bird v. Appleton*, 1 East, 111.

Hullock, in support of his rule. In *Worcestershire Canal Company v. The Trent Navigation Company*, both parties were in default, because, if either had been attentive, a proper verdict might have been procured. Here the second proceeding was rendered necessary by the perverseness of the defendant.

Cur. adv. vult.

And now, The Court took the same view of the matter; and looking to the peculiar circumstances of this case, without impeaching the rule which had been laid down in others, or laying down any rule for the future, intimated that the prothonotary should allow the costs of the first trial.

Rule absolute.

JOSEPH DUNN v. WILLIAM CRUMP.—p. 309.

1. *Assumpsit* for work and labour in healing horses, within the jurisdiction of a county court, and for potions, &c., administered on those occasions: *Held*, that this amounted to a sufficient allegation that the potions were administered within the jurisdiction of the county court.
2. A mere miscalculation will not avoid a judgment, therefore, where a jury assessed damages at 1*l.* 8*s.* 6*d.*, besides costs, and the costs at 12*d.*, and judgment was entered up, "that the plaintiff do recover against the defendant, his damages, costs, and charges, in form aforesaid, assessed by the said jury at 1*l.* 8*s.* 6*d.*, and also 7*l.* 9*s.* 10*d.*, for his costs and charges aforesaid by the said court here adjudged of increase to the plaintiff, and with his assent, which said damages, in the whole, amount to 8*l.* 18*s.* 4*d.*: and the said defendant in mercy, &c." it was held sufficient.

WRIT of false judgment from the county court of Worcester. The declaration stated, in the first count, that, whereas the defendant on,

&c., 'at Eckington, in the county of Worcester, and within the jurisdiction of that Court, was indebted to the plaintiff in 39s. of lawful money of Great Britain, for the work and labour, care and diligence of the said plaintiff, by him before that time, and within the jurisdiction of that Court, done, performed, and bestowed, at the special instance and request of the said defendant, in and about the healing and curing of divers mares and geldings, of the said defendant, of divers diseases, disorders, and maladies, under which they before then had respectively laboured and languished, and in and about the endeavouring to heal and cure divers other horses, mares, and geldings of the said defendant, of divers other diseases, &c., under which they had before then respectively laboured and languished, and for divers potions, draughts, ointments, medicines, and other necessities used, administered, and applied on those occasions by the said plaintiff, at the like request of the said defendant, and being so indebted, he the plaintiff, in consideration thereof, afterwards, to wit, on, &c., at, &c., and within the jurisdiction of that Court, took upon himself, and then and there faithfully promised, &c., to pay the same whenever, &c." In the last count of the declaration, a charge for potions, &c., was laid in the same manner as the first. The jury found a verdict for the plaintiff, and assessed the damages at 1*l.* 8*s.* 6*d.*, besides costs, and the costs at 12*d.*

The judgment was, "that the said Joseph Dunn do recover against the said William Crump, his damages, costs, and charges in form aforesaid, assessed by the said jury at 1*l.* 8*s.* 6*d.*, and also 7*l.* 9*s.* 10*d.* for his costs and charges aforesaid, by the said Court here adjudged of increase to the said Joseph Dunn, and with his assent, which said damages, in the whole, amount to 8*l.* 18*s.* 4*d.*, and the said William Crump, in mercy," &c.

Assignment of false judgment in this, viz., that it is not stated or alleged, nor does it appear in and by the first and last counts of the said declaration, that the potions, &c., in those counts mentioned, were used or applied by the plaintiff on the occasions therein mentioned within the jurisdiction of the county court aforesaid; and also in this, that the consideration for the promises, &c., in the declaration mentioned, does not appear, nor is stated in the declaration to have arisen or happened within the jurisdiction of the said Court, and also, &c.

Joinder.

Lawes, Serjt., for the defendant, contended, 1st, that the whole of the consideration did not appear to have arisen within the jurisdiction of the inferior court, the declaration omitting to state that the potions had been administered within the jurisdiction: he cited 1 Wms. Saunders, 74, note 1, *Peacock v. Bell*, and *Waldock v. Cooper*, 2 Wils. 16.

2dly, That the judgment ought to have been for 1*l.* 9*s.* 6*d.* (the sum given by the jury) with costs of increase, instead of 1*l.* 8*s.* 6*d.* To show that a defendant might object to an erroneous judgment, though in his own favour, he cited 2 Roll. Abr. 759, tit. Error, (Y) *Becher's* case, 8 Rep. 58; *Heines v. Guie*, 10 Vin. Abr. p. 61, tit. Error, (1 c. 12,) pl. 3 Yelv. 107, and Bac. Abr. Error, K. 4.

And to show that the judgment below, being against the defendant,

the Court could only reverse it, and not give a right judgment, as they might if the judgment below had been against the plaintiff, he cited *Bac. Abr. Error, M. 2*, and he urged that if the Court took on themselves to amend this judgment, the statutes of Jeofails would be rendered unnecessary.

Peake, Serjt., for the plaintiff, cited the dictum of *BULLER, J.*, in *Gamon v. Jones*, 4 T. R. 509, that "it is an invariable rule, that if a judgment be more favourable for the plaintiff than he is entitled to, he cannot take advantage of it, because he is not injured by it." He also cited 1 Roll. Abr. 205, Amendment F. pl. 5, 1 Salk. 401, Judgment 8, and Cro. Eliz. 806, *Williams v. White*, and *RICHARDSON, J.*, referred to Shower's Quere at the end of *Anger v. Brooken*, 2 Show. 89.

Lawes in reply. It does not appear in the case in 1 Roll. Abr. 205, that the amendment was not made by the court below, the propriety of which is not disputed; and the authority in Salk. 401, only, says the Court of Error may amend if the record will warrant it, which cannot be affirmed of the present case.

Cur. adv. vult.

And now the judgment of the Court was delivered by

DALLAS, C. J. The first error assigned is, that the whole of the consideration for the promises is not alleged to have accrued within the jurisdiction; but it is alleged that the work and labour done by the plaintiff, in curing and endeavouring to cure the defendant's horses, was done within the jurisdiction; and it is further alleged, that the ointments and medicines which were used were administered and applied on those occasions; which we think sufficiently shows that they must have been administered and applied there.

The second error insisted on is, that whereas the jury have assessed the plaintiff's damages, besides his costs and charges, at 1*l.* 8*s.* 6*d.*, and those costs and charges at 12*d.*, the Court, in giving judgment, have omitted the costs assessed by the jury, and yet have awarded costs of increase, there being nothing to which those costs of increase can attach themselves, and then have summed up together the damages and costs of increase, still omitting the costs assessed by the jury; which, it is contended, vitiates the whole judgment. In support of this objection, *Heines v. Guie*, Yelv. 107, was cited, where the jury gave 8*l.* damages and 2*d.* costs, and the judgment was *Ideo considerat' est quod the plaintiff recuperet damna sua per jurat' prædict' assessa in forma prædicta ad 8*l.* necnon 20*s.* pro misis et custag' de increment' Curiaë*; and adjudged error, because the costs given by the jury were omitted.

Anger v. Brooken, as reported in 3 Show. 56, 88, is to the same effect, where the jury, on a writ of enquiry, assessed damages 100*l.* and 6*d.* costs, and the judgment was, *quod prædict' querens recuperet dumna sua prædict' ad cent' libras per inquisition' prædict' compert' et pro increment' 7*l.** And the Court unwillingly held this to be error, because the jury had given particulars, viz., so much for damages and so much for costs, and the judgment was for the damages only; which they thought was not a mere miscalculation, but a total omission

of the costs found by the jury. It seems that, if they could have considered it as a mere miscalculation, they would have disregarded the objection.

And there are cases which would have warranted them in so doing. "In an action upon the case upon a promise, if judgment be given for the plaintiff upon demurrer, and a writ of damages awarded, and there upon damages taxed to 35*l.*; and upon this judgment is given *quod querens recuperet damna præd' ad 37*l.* per juratores præd' assessa*, yet this judgment is not erroneous, because the judgment is perfect by the first words, *quod recuperet damna prædicta*, without more; and, therefore, the summoning* thereof afterwards is but surplusage; and, therefore, this being mistaken, it does not vitiate the judgment." *Guier v. Goter*, Vin. Abr. Error, Bb. pl. 13. "In an action upon the case upon a promise, and a verdict for the plaintiffs,* and damages and costs given, and the judgment is *quod querens recuperet damna sua ad 6*d.* per juratores prædictos in forma prædicta assessa*, and the damages and costs are mistaken, not amounting to so much; yet this is not erroneous, for this is only a miscasting, and *damna præd'* intends only those which were assessed, and so the judgment is not for more." *Morcock v. Hootes*, Vin. Abr. Error, Bb. pl. 34. Here the judgment is, "that the said Joseph Dunn do recover against the said William Crump, his damages, costs, and charges in form aforesaid assessed by the said jury at 1*l.* 8*s.* 6*d.*, and also 7*l.* 9*s.* 10*d.* for his costs and charges aforesaid, by the said Court here adjudged of increase to the said Joseph Dunn, and with his assent, which said damages in the whole amount to 8*l.* 18*s.* 4*d.*," which expressly adjudges the costs and charges, as well as the damages given by the jury, but miscalculates the amount. The judgment is complete, for the damages, costs, and charges assessed by the jury, without the words "at 1*l.* 8*s.* 6*d.*," which being a mere miscalculation and unnecessary, may be rejected as surplusage. The additional words, "which said damages in the whole amount to 8*l.* 18*s.* 4*d.*," contain another miscalculation; but this will not vitiate the previous judgment, which was before complete, as well for the damages, costs, and charges assessed by the jury, as for the costs of increase.

Judgment affirmed.

* *Sic in loc. cit.*

END OF EASTER TERM.

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1. Debt will not lie during the life of the annuitant, for the arrears of an annuity for life issuing out of lands, though the declaration

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1. Debt on stat. 2 G. 2, c. 23, for acting as a solicitor in the Court of Chancery (viz. in the matter of T. S., a bankrupt), the defendant not being a solicitor of the said court:—the plaintiff, having proved that the defendant (not a solicitor of the court) had been consulted, and had been instrumental in the matter of a petition to the Lord Chancellor by the creditors of T. S. (which petition bore the name of certain admitted solicitors, and was intitled "In bankruptcy,") praying for the taxation of the bill of the solicitor to the commission, was nonsuited, and the Court refused to set the nonsuit aside: *Semble*, that proceedings in bankruptcy are not proceedings in Chancery. *Ford v. Webb*, 241
2. The Court of C. P. refused to strike an attorney off the Rolls, because he had some years ago been struck off the Rolls of the Court of K. B., the contents of the affidavits on which the Court of K. B. acted, not having been stated, and there being no proof or allegation that the attorney had been struck off for a misdemeanor. *Ex parte Hague*, 257

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Held, that a purchaser did not acquire any property under a sale by auction at which he and his friend were the only bidders, the rest of the company being deterred from bidding by the purchaser's stating to them he had a claim against, and had been ill used by, the late owner of the article. *Ful-ler v. Abrahams*, 116

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1. A jury having found that a keeper of hounds, who bought dead horses for his dogs, and then sold the skins and bones for a profit, was not thereby a trader, the Court refused to grant a new trial, or to disturb the verdict. *Summersett v. Jarvis*, 2
2. The plaintiff, against whom a commission of bankrupt had been wrongfully issued, being required by the assignees under the commission to deliver up his books, did so: Held, that he might recover of the assignees in trover, without formally demanding a restoration of the books. *Ibid.*
3. A bankrupt refusing to be sworn before the commissioners, on the ground that his legal adviser had not arrived: Held, that their

warrant for his commitment, stating generally that he refused to be sworn, was sufficient, without adding the reason assigned by the bankrupt for his refusal.

Held, also, that the warrant committing him "until such time as he shall submit himself to us, or the major part of the said commissioners by the said commission named and authorized, and take the oath prescribed by law for that purpose, and full answer make to our or their satisfaction to the questions which may be put to him by virtue of the said commission," was sufficient; and that by "the questions which may be put to him by virtue of the said commissioners," must be implied legal questions. *Nobes v. Mountain*, 233

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Defendant being indebted to plaintiff for goods sold, gave him a bill of exchange, not due (drawn and accepted by two other persons), to a greater amount than the price of the goods, and plaintiff gave defendant the difference in money. Defendant endorsed the bill in blank. Plaintiff having lost the bill before it was paid, Held, that he could not sue the defendant for the price of the goods, or on the lost bill. *Champion v. Terry*, 294

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Plaintiffs having received an order from a stranger to furnish J. Parker, of High Street, Oxford, with goods, and finding upon inquiry that Mr. Parker of the High Street was a tradesman of respectability, forwarded the goods by a carrier, having directed them to J. Parker, High Street, Oxford. On the arrival of the parcel at Oxford, the carrier's porter there, who knew W. Parker of the High Street (and who was accustomed to deliver parcels at the houses of the consignees), told him of the arrival of the parcel, no other Parker residing in that street. W. P. said he expected no parcel. A person to whom the porter had before delivered parcels under the name of Parker, called at the defendant's office shortly afterwards, and saying the parcel was his, was allowed to take it on paying the carriage, there being many persons of that name at Oxford. The plaintiffs having thus lost their goods, desired the defendant, by letter, to apprehend the person who had taken them, if he again presented himself, and afterwards said, that they had done with the defendant, if the man who had the parcel were produced. A notice was suspended in a conspicuous part of the defendant's office, limiting his responsibility to 5*l.*, except where articles were

entered according to their value; and the parcel in question had not been so entered, though worth 89*l.*; but the plaintiffs' porter swore he never saw the notice. The plaintiffs having sued the carrier, and the Judge having directed the jury that the carrier's negligence had been such as to render it unnecessary to consider the question as to the notice touching the limited responsibility, and a verdict having been found for the plaintiffs,

The Court refused to grant a new trial, which was moved for on the ground that the question touching the negligence and unskillfulness of the captain, the freighter sued the owners (one of whom was the captain) for damages, in an action on the case: Held, that the action lay, though the captain had entered into a charter-party, under seal, with the freighter and another, by which he engaged to convey the goods to their destination; it not appearing on the charter-party that the captain was part owner, nor that the freighter knew him to be such when the charter-party was executed. *Leslie v. Wilson*, 171

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Goods conveyed by ship having been spoiled, in consequence of the negligence and unskillfulness of the captain, the freighter sued the owners (one of whom was the captain) for damages, in an action on the case: Held, that the action lay, though the captain had entered into a charter-party, under seal, with the freighter and another, by which he engaged to convey the goods to their destination; it not appearing on the charter-party that the captain was part owner, nor that the freighter knew him to be such when the charter-party was executed. *Leslie v. Wilson*, 171

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1. The Court will not grant a rule *nisi* to discharge a party out of custody, who was in execution for costs arising to a magistrate, from a verdict in an action for false imprisonment, on the ground of the costs having been paid to the magistrate by the treasury. *Butt v. Conant*, 3
2. The expense of experiments necessarily made for the purpose of affording evidence on a point in dispute new to scientific men, is not allowed on taxation of costs. *Serrew v. Olive*, 72
3. Nor are scientific and professional witnesses allowed any compensation for loss of time, unless they be medical men. *Ibid.*
4. Two actions against one insurance company, and two against another, on the same loss, were at issue in Hilary term, 1820: the second, third, and fourth were set down for trial, at the sittings after that term, but not the first, upon two of the pleas in which there were demurrers. The second cause was tried at those sittings, and a verdict was found for the plaintiff. A rule *nisi* for a new trial in this cause was obtained in Easter term; but was suspended from time to time, till one of the other causes should also have been tried, and the result of certain proposed experiments touching the point in dispute be made known. At the sittings after Michaelmas term, 1820, the first, third, and fourth causes were set down for trial; and the third, which then stood first in the paper, was tried, on which a verdict was found for the plaintiff: Held, that the costs were rightly apportioned by the prothonotary, half to be paid by one company and half by the other. *Ibid.*
5. Trespass in some named and some unnamed closes of the plaintiff, and also for taking his goods and chattels. Pleas: 1st, not guilty, to the whole declaration; 2dly, as to part, a special plea of license; 3dly and 4thly, as to part, certain special pleas, on which the jury were, by consent, discharged from giving any verdict; 5thly, as to the unnamed closes, *lib. ten.* The replication took issue on the plea of not guilty, traversed the license mentioned in the second plea, and also now assigned on that plea; and, as to the unnamed closes, contained a *nolle prosequi*. The rejoinder took issue on the traverse, judgment was suffered by default on the new assignment, and the cause went down to trial, as well to try the issues joined, as to assess the plaintiff's damages on the new assignment. The jury found for the plaintiff on the general issue (without any damages); for the defendant on the plea of license; and assessed to the plaintiff on the new assignment, 1*l.* damages and 1*l.* costs: Held, that the plaintiff was entitled to the general costs of the

ause, including those of the trial, the costs of the issue found for the defendant being deducted, but no costs being allowed to the defendant on that issue. *House v. The Commissioners of the Thames*, 117

6. Plaintiff, an attorney, sued for 21*l.* 7*s.* 11*d.* Defendant, previously to the delivery of declaration, took out a summons to stay proceedings, on payment of 15*l.* and the costs then incurred. Plaintiff refusing to accept the 15*l.*, proceeded by delivering a declaration, but afterwards took the 15*l.* in full satisfaction of his demand, and taxed his costs. The debt having been due to the plaintiff for five years, and the defendant having frequently promised to pay it, the Court refused to order the costs to be re-taxed, so as to allow the defendant the costs incurred between the summons to stay proceedings and the taking of the money out of court. *Carr v. Smythies*, 168

7. The defendant, on being arrested, paid, under 43 G. 3, c. 46, the debt, and 10*l.* for costs (which 10*l.* was more than sufficient to cover the costs), and informed the plaintiff's attorney that he should reclaim only the surplus which might remain after payment of debt and costs; the plaintiff's attorney, on the sheriff's omitting, after request, to remit the money, proceeded in the action, and incurred further costs: Held, that the defendant was not liable to pay the costs so incurred after the arrest. *Clarke v. Yeates*, 273

8. In an action on the case against an agent for misfeasance, the declaration, in addition to the counts on the misfeasance, contained two counts in trover, with an allegation of special damage. The plaintiff failed in substantiating the counts for misfeasance, or the allegations of special damage, but recovered on the bare count in trover: Held, that he was entitled only to the costs of, and occasioned by that count, divested of the special damage allegation; and that he was entitled to the sum sworn to have been paid for the postage of foreign letters solely applicable to the cause. *Lopes v. De Tastet*, 292

9. No costs are allowed for the loss of a broker's time. *Ibid.*

10. No costs are allowed for a witness who has not been paid before the claim is made. *Ibid.*

11. The plaintiff obtained a verdict, subject to the award of an arbitrator. The arbitrator having made a material mistake in his award, and the defendant having refused to refer matters back, the Court of C. P. set aside the verdict, and discharged the rule for reference. The plaintiff took the cause down to trial a second time, and, a second time, obtained a verdict: Held, that he was entitled to the costs of both trials. *Payne v. Bailey*, 304

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DEEDS.

See EVIDENCE, 4. STAMP, 1.

By a deed of feoffment of 1621, Sir N. S. (in consideration of 100*l.* paid by the feoffees and the other inhabitants of Enfield, and of a free school for ever, to be held for the instruction of the children of inhabitants of Enfield), granted certain lands to fourteen feoffees, to the intent that they and their heirs should pay 20*l.* a year out of the rents towards the maintenance of a schoolmaster for such school, and the residue for other purposes, provided that no act concerning the lands or their rents should be done, but in a vestry, or meeting of the feoffees, and ten at least of the inhabitants of Enfield, which should be vestrymen, and not feoffees, in a vestry to be held by them in a chamber over the school, or in the vestry, situate in the parish church, upon public warning, to be given in the church the Sunday before the meeting. Schoolmasters were to be elected in this way within three months after every vacancy, and were to give a bond to three feoffees to resign the appointment upon half a year's warning by the feoffees, or any of them, so it were with the consent and agreement of the feoffees and vestrymen, or the most part of them, which should be assembled in a vestry or meeting, to be held as aforesaid, so always as at least ten of the vestrymen which were not feoffees should vote at the holding of the vestry. Two feoffees were to receive the rents, and account for them the Sunday after the receipt, at a vestry, consisting of the persons before described, and held and convened in the mode before mentioned. When the feoffees should be all dead but five, four, or three, at the least, or gone to live out of the parish, the survivors were to enfeoff fourteen others, of discreet and wealthy men, then inhabitants in the parish, to be chosen by the vestrymen of the parish, or the greater number at a vestry, to be holden in the manner before described: Held that, in the execution of the power of removal of the schoolmaster, the votes were to be taken *per capita*, and not according to the provisions of 58 G. 3, c. 59. *Attorney-General v. Wilkinson*, 266

DEVISE.

And see ADVOWSON.

1. Devise. "As for my temporal estate and effects, I give and dispose of the same in manner following: I give and bequeath to L. C. 4*l.*; I give and bequeath to M. H. 3*l.*; I give, devise, and bequeath to J. G. all my lands, tenements, and hereditaments, with their appurtenances, particularly those called B. and C.; and all the rest and residue of my goods and chattels, personal and test-

mentary effects whatsoever, I give and bequeath to the said J. G., whom I make sole executor of this my will:" Held, that J. G. took a fee in the lands B. and C. *Doe dem. Penwarden v. Gilbert*, 85

2. Bequest of personality to testator's sister and nephew during their joint lives, share and share alike, and to the survivor for life, *in case there should happen to be no issue living of them or either of them; but in case both, or either, should leave any issue*, to the survivor of the said sister or nephew one moiety of the said personality for his or her life, the other moiety, or such part of the same as should be thought needful by the executor of the party dying and leaving issue, to be applied to the maintenance and education of all and every the child and children of the party so dying, during the respective minorities of such child or children; and after the death of the survivor of the said sister and nephew, the survivor's moiety in the personality, or such part thereof as should be thought necessary by the executor of such survivor, to be applied to the maintenance and education of all and every the child and children of such survivor, during their respective minorities, and *when and as* such several children of the said sister and nephew (if there should be any) should respectively attain their age of 21, the whole of the said personality unto and equally amongst all of them, share and share alike; and if but one, then to such only child: the persons who eventually should have the payment of the shares to have due regard to the expenditure of the children during their minorities, in order to the division of the property being made as equal as possible. But if the nephew only should have issue living at the time of the death of survivor of sister and nephew, the property was to be divided among all his children, in such shares as he by will should appoint; and in default of such will, equally among all such children. If the sister and nephew should both die without leaving issue, the property was given to such person or persons, in such shares as the survivor of sister and nephew should by will appoint; and in default thereof, to testator's personal representatives.

Then followed a devise of real estate to the sister and nephew for their joint lives, and to the survivor for his or her life, *in case there should be no issue living of them, or either of them; but in case both, or either of them, should leave any issue*, then to the survivor of the sister and nephew one undivided moiety of the real estate for his or her life; the rents and profits of the other undivided moiety to be applied to all and every the child and children of either of them (the sister and nephew) so dying, during their several minorities, if there should be occasion for it, in like manner as was directed regarding the personal estate; and after the death of the survivor of the sister and nephew, the remaining moiety of the rents and profits of the real estate was to be applied in like manner, if there should be occasion, to all and every the child and

children of such survivor, during their several minorities; and *when and as* such several children of the sister and nephew (if any such there should be) should respectively attain their age of twenty-one, the whole of the real estate was given unto and equally amongst all such children, share and share alike, if more than one, as tenants in common, and to their respective heirs and assigns, for ever; and in case the sister and nephew should both die without leaving, or, there being issue, they should die under 21 without issue, the real estate was given to G. M.:

Held, that under this will, a child of the nephew, the only issue of nephew or niece alive at the death of the deviser, took, at the death of the deviser, a vested estate in fee simple in remainder in the deviser's real property, subject to be divested in part by the birth of other children of the nephew or niece, or either of them, and determinable altogether in the event of such child dying in the lifetime of the nephew, or under age without issue. *Machin v. Reynolds*, 121

3. A., on the marriage of his daughter C., conveyed property to the use of himself for life; remainder to the use of B., his daughter's intended husband, for life; remainder to the use of C. for life; remainder to the use of the sons of the marriage successively in tail; remainder to the use of the daughters of the marriage as tenants in common in tail; reversion to the use of A. A. afterwards, on his death, devised all his property, not before settled, to the use of his widow for life; remainder to the use of B. for life; remainder to the use of C. for life; remainder to the use of their sons successively in tail, (subject to a term for the provision of younger children;) remainder to the use of the daughters as tenants in common in tail; remainder to the use of C. and her heirs. B. and C. afterwards levied a fine of all the before-mentioned premises to the use (subject to the uses in the settlement and will mentioned) of such person as C., by will in writing, or any writing of appointment purporting such will to be by her signed, in the presence of, and attested by three or more witnesses, should appoint; (which will, or writing of appointment in nature of a will, C., notwithstanding her coverture, was thereby empowered to make,) and, in the mean time, and for want of such appointment for the whole or any part, to the use of C. and her heirs. C. having survived B., by whom she had no issue, married D., whom she also survived, and then died, leaving E. an only son by D. To this son C., in 1819, by an instrument purporting to be her will, signed in the presence of, and attested by three witnesses, left all her real estate in fee, the instrument contained a provision that the property should go over to C.'s sister in case of E.'s dying in C.'s lifetime. E. shortly afterwards died a minor, intestate and without issue: Held, 1. that the instrument executed by C. in 1819, did not, as to the estates comprised in the fine, operate as an execution of C.'s power of appointment, but as a devise by her by force

of her interest. 2. That E. took by descent from his mother, and not by purchase. *Langley v. Sneyd*, 243

DISTRESS.

Goods of the principal in the hands of his factor cannot be distrained by the landlord of the factor's premises for arrears of rent due to him from the factor. *Gilman v. Elton*, 75

DIVORCE.

See PRACTICE, 4.

DRAINAGE.

See LIMITATION OF ACTIONS.

ESCAPE.

See EVIDENCE, 1, 2, and ATTACHMENT.

EVIDENCE.

And see BANKRUPTCY, 1. COSTS, 2, 8. OATH. STAMP, 1, 2, 3.

1. In an action for an escape, the sheriff's authority for appointing a bailiff was proved by a person belonging to the sheriff's office, who had endorsed the bailiff's name on the writ produced: A verdict having been found for the plaintiff, the Court refused to set it aside, holding, that this proof was sufficient. *Francis v. Neave*, 26
2. In an action for an escape, the writ in the former action being produced bearing an endorsement purporting to record the sheriff's delivery of a warrant to B., and B., on being called, stating that he had delivered the warrant to another, who did not produce it: Held, that it ought to have been left to the jury to say whether B. acted under the sheriff's authority. *Fermor v. Phillips*, 27
3. Entries made by a deceased collector of taxes in a public book, handed down to him by his predecessor in office, and afterwards delivered to his successor, are evidence against his surety, in an action on a bond conditioned for the due performance of the collector's duty, and the delivery up of the books kept by him in his office.
Quare, Whether the receipts signed by such collector, for moneys payable to him in his official capacity, are evidence against his surety in such case. *Goss v. Watlington*, 132
4. The defendants, assignees of a bankrupt, produced, under a notice from the plaintiff (in an action for use and occupation), the deed of assignment of the bankrupt's effects: Held, that the deed was admissible in evidence, though not proved by the attesting witness, it having been shown that the defendants occupied under the deed. *Orr v. Morrice*, 139
5. The copy of an original letter giving notice of the dishonour of a bill, is admissible in evidence, without notice to produce the original letter. By C. P., after conference with K. B. *Kine v. Beaumont*, 288
6. In an action on an agreement to pay 100*l.*, if plaintiff would not send herrings for one

twelvemonth to the London market, and, in particular, to the house of J. and A. M., the plaintiff proved he had sent no herrings during the twelvemonth to house of J. and A. M.: Held sufficient to entitle him to recover, no proof being given that he had sent herrings within that time to the London market. *Calder v. Rutherford*, 302

EXECUTION.

See ATTACHMENT. COSTS, 1. SHERIFF, 2.

EXECUTOR.

See AGREEMENT.

EXPERIMENTS.

See COSTS, 2.

EXTORTION.

See SHERIFF, 1.

FACTOR.

See DISTRESS.

FIERI FACIAS.

See SHERIFF, 2.

FOREIGN LETTERS.

See COSTS, 8.

FORGERY.

1. The prisoner having promised in payment for some goods on acceptance by a London banker, gave a bill addressed to, and purporting to be accepted by Williams and Co., No. 3, Birch Lane, London; it was proved that Williams, Burgess & Co. of No. 20, Birch Lane, had not accepted the bill, and that no other bankers of the name of Williams & Co. were known in London, but no evidence was adduced to show that Williams & Co. of No. 3, Birch Lane, had not accepted the bill: Held, that there was no forgery proved against the prisoner, by ten Judges against one, BAYLEY, J., *absent*.
The King v. Watts, 197
See also *Rex v. Webb*, 288
2. The forgery of a Prussian treasury note for one dollar is within the statute 43 G. 3. c. 139, s. 1. *The King v. Goldstein*, 201
3. The prisoner was convicted of forging an instrument (purporting to be a Prussian treasury note), in a foreign language. No count in the indictment containing any English translation of the note, the Court arrested the judgment on this ground. By eight Judges against two, WOOD, B., and BAYLEY, J., *absentibus*. *Id*

FORMEDON.

See LIMITATION (Statutes of), 2.

FRAUD.

See FORGERY.

FRAUDS (STATUTE OF).

See GUARANTEE.

FREIGHT.

See INSURANCE, 1, 2, 3, 4.

GOODS SOLD.

See BILL OF EXCHANGE.

GRANT.

See ANNUITY and DEEDS.

GUARANTEE.

1. "To the amount of 180*l*. consider me as security on J. C.'s account, signed and dated: Held, not a sufficient memorandum (under 29 Car. 2, c. 3, s. 4) of an agreement to pay for the default of J. C. *Jenkins v. Reynolds*, 14
2. "I hereby guarantee the present account of H. M. due to R. T. S. of 112*l*. 4*s*. 4*d*. and what she may contract from this date to the 30th September next," (signed and dated): Held, that the consideration sufficiently appeared on the face of this instrument under 29 Car. 2, c. 3, s. 4. *Russell v. Mosely*, 211

HABEAS CORPUS.

See ATTACHMENT, and PRACTICE, 6.

HYPOTHECACTION.

See INSURANCE, 3.

INCLOSURE ACT.

See COMMISSIONERS.

INQUIRY.

See WRIT OF INQUIRY.

INSOLVENT DEBTORS' ACT.

See ATTACHMENT. OFFICER OF COURT.

INSURANCE.

1. Insurance on a cargo of wine to be discharged partly at B., partly at D., and partly at L. The vessel which conveyed the cargo, being wrecked near B., and three-fourths of the cargo being either lost or so impregnated with salt water, as to render it imprudent to delay the sale till the ports of D. or L. could be reached, the assured, on the 23d of December, the day they heard of the loss, gave notice of abandonment; and, on the 27th of December, called a meeting of underwriters, which three underwriters attended, and ordered the assured to do the best for all parties. On the 28th of the ensuing February, and not before, some of the underwriters interfered, forbidding a sale of the damaged wines about to take place at B., and rejecting the abandonment: Held, that this was a total loss, and entitled the assured to abandon; and that, at all events, the underwriters,

not having stirred for more than two months after notice of the abandonment, must be taken to have acquiesced in it. *Hudson v. Harrison*, 97

2. An insurer, who rejects an abandonment, must do so within a reasonable time. *Ibid.*
3. Insurance for 8000*l*. on ship Victoria, and 4000*l*. on freight, at and from London to the East Indies and back. The ship sailed seaworthy from Calcutta on her voyage home, when, in addition to some damage which she sustained in the river Hooghly, she encountered two storms at sea, by which she was so shattered as to render it necessary for the captain to put back; and he returned to Calcutta on the 30th August, 1820. On his arrival at Calcutta, he gave notice of abandonment to the agents for Lloyd's, resident there, and requested that their surveyor might be present at the surveys of the ship. The agents said they had no authority to accept the abandonment; but their surveyor attended the surveys, when it was found that the ship was so seriously damaged, that the expense of repairing her would be nearly 6000*l*. The agents refused to undertake the repairs; and the captain, having in vain attempted to borrow money for that purpose by hypothecation of ship, sold the ship for 1200*l*, conceiving that to be the best course for all parties. On the 25th April, 1821, the captain arrived in London, where the owner resided; and, on the 3d May, the ship's papers were delivered. On the 5th May, the ship's brokers abandoned to the underwriters.

In an action on the policy on ship, the jury having found a verdict for the plaintiff as for a total loss, and that the captain had sold the ship for a justifiable cause, the Court (*Richardson, J., dissentiente*) refused to grant a new trial, which was moved for, on the ground that the ship ought not to have been sold, and that notice of abandonment had not been given in due time. *Read v. Bonham*, 147

4. Policy of insurance on ship and goods at and from Cuba to Liverpool, with liberty "in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever; and with leave to discharge and take in, at any ports or places she might touch at, without prejudice to that insurance." The insured, after subscription of the policy, inserted in the body of it the words, "with leave to call off Jamaica," to which interpolation all the underwriters assented, without increase of premium, except the defendant, who being out of the way was not applied to. The captain sailed from Cuba with eight men, engaged to navigate to Liverpool, and two to Jamaica, being unable at Cuba to procure ten men (the proper complement of the crew) for Liverpool. She then touched at Jamaica, for the sole purpose of landing the two men, and procuring others in their stead; and, having accomplished his purpose, was lost on the voyage from Jamaica to Liverpool: Held,

1st, That this was a material alteration of the policy, and rendered it void.

2d, That the ship was not, as to the crew, sea-worthy for the whole voyage (as she

ought to have been) when she sailed from Cuba.

3d, That the circumstance of her having become sea-worthy after her leaving Cuba, and before the loss, did not entitle the plaintiff to recover. *Forshaw v. Chabert*, 158

INTERLINEATION. §

See INSURANCE, 4.

IRISH TRADERS.

See PILOT ACT.

JUDGMENT.

And see PLEADING, 2. PRACTICE, 6; and WRIT OF INQUIRY.

A mere miscalculation will not avoid a judgment. Therefore, where a jury assessed damages at 11. 8s. 6d. besides costs, and the costs at 12d., and judgment was entered up, "that the plaintiff do recover against the defendant his damages, costs, and charges, in form aforesaid, assessed by the said jury at 11. 8s. 6d., and also 7l. 9s. 10d. for his costs and charges aforesaid by the said court here adjudged of increase to the plaintiff, and with his assent, which said damages in the whole amount to 8l. 18s. 4d., and the said defendant, in mercy, &c.," it was held sufficient. *Dunn v. Crump*, 309

JURY.

Where it was sworn that handbills, reflecting on the plaintiff's character, had been distributed in court, and shown to the jury on the day of trial, the Court would not receive from the jury affidavits in contradiction; and granted a new trial against the defendant, though he denied all knowledge of the handbills. *Coster v. Merest*, 272

LANDLORD AND TENANT.

See DISTRESS, and STAMP, 2, 3.

LEASE.

See STAMP, 3.

LETTER.

See EVIDENCE, 5, and COSTS, 8.

LEVARI FACIAS.

See SHERIFF, 1.

LIBEL.

See PLEADING, 4.

LIMITATION OF ACTIONS.

And see LIMITATION (*Statutes of*).

The surveyor under a drainage statute is enti-

tled to take advantage of a clause limiting the commencement of actions to six months after the act complained of, though it does not appear he has made the compensation directed by the statute for the act complained of, or pursued the course on the observance of which the statute enables him to enter on the lands of others. *Boothby v. Morton*, 239

LIMITATION (*Statutes of*).

1. In an action in the Common Pleas, the question being, whether a debt was barred by the statute of limitations, the creditor proved an action commenced in the King's Bench six years before, and continuances regularly entered down to the term before the trial of the action in C. P.: Held that the debt was not barred. *Gregory v. Hurrih*, 212
2. The 20 years within which a *formedon* in the *descender* ought to be commenced under the statute. 21 Jac. 1, c. 16, begin to run when the title descends to the first heir in tail, unless he lie under a disability. *Tolson v. Kaye*, 217

MARRIAGE SETTLEMENT.

See DEVISE, 3.

MEMORANDA, 69, 231.

MISCALCULATION.

See JUDGMENT.

MISNOMER.

See PRACTICE, 3.

NEGLIGENCE.

See CARRIER. CHARTER-PARTY. PLEADING, 2.

NOTICE.

See CARRIER. EVIDENCE, 4, 5.

OATH.

On an application for a new trial, it appeared that a witness, who gave himself a false name at the trial, and was sworn on the gospel, was, at that time, a Jew: Held, that the objection came too late, and that the oath, as taken, subjected the witness to the consequences of perjury, if he had sworn falsely. *Selle v. Hoare*, 232

OFFICER OF COURT (*his Liability*).

An order drawn up in the name of the Court, by an officer of a court of justice, is, until amended or set aside, the order of the Court. Therefore, where an officer of the Insolvent Debtors' Court, instead of drawing up an order for the further imprisonment of an insolvent, pursuant to the decision of the Court, drew up an order for his discharge,

and the insolvent was thereon discharged, the order not having been amended or set aside: Held, on demurrer to the declaration, that no action lay by a creditor of the insolvent against the officer, though the declaration stated that the officer *wrongfully*, falsely, and unlawfully, made out and issued such order, *purporting* to be an order from the Court. *Whitelegge v. Richards*, 188

OFFICER, PUBLIC (*his Liability*).

An action does not lie against a public officer by individuals for sums which, as a public officer, he is authorized to pay them, although he may have received the money applicable to that purpose: Held, therefore, that *assumpsit* does not lie against the secretary at war by a retired clerk of the war office for his retired allowance, although the secretary at war received the money applicable to such allowance. *Gidley v. Lord Palmerston*, 275

ORDER FOR THE PAYMENT OF MONEY.

See FORGERY, 2, 3.

PARTNER.

See AGREEMENT.

PATENT.

A patent was taken out "for an improved method of making sailcloth without any starch whatever." The improvement or discovery (if any) consisted in a new mode of texture, and not in the exclusion of starch, the advantage of excluding which had been discovered and made public before: Held, that the patent was void, as claiming, in addition to what the patentee had discovered, the discovery of something already made public. *Champion v. Benyon*, 5

PERJURY.

See OATH.

PILOT ACT.

A vessel trading to and from London to Belfast, and proceeding down the Thames on her voyage to the latter port, not laden with corn, grain, meal, flour, bread, or biscuits, is not within the second section of 52 G. 3, c. 29, which exempts from the obligation of taking a Trinity House pilot on board all coasting vessels, and all Irish traders using the navigation of the Thames as coasters. *Davison v. McKibben*, 112

PLEADING.

And see ANNUITY. COSTS, 5. FORGERY, 3. OFFICER OF COURT. PRACTICE, 3. SHERIFF, 1. VARIANCE.

1. A defendant may be declared against as administrator, though the process only describes him generally. *Watson v. Pilling*, 4

2. In an action on the case in B. R. against ten defendants, as proprietors of a coach, for injuries sustained by the plaintiff, a passenger, in consequence of negligence in driving, whereby the coach was upset, the jury found a verdict against eight of the defendants, and in favour of the other two; and judgment was entered accordingly. On error in *Cam. Scacc.* the judgment was affirmed. *Bretherton v. Wood*, 54

3. *Assumpsit* for work and labour in healing horses within the jurisdiction of a county court, and for potions, &c., administered on those occasions: Held, that this amounted to a sufficient allegation that the potions were administered within the jurisdiction of the county court. *Dunn v. Crump*, 309

4. Where an account of certain proceedings in a court of law was headed in a newspaper, "shameful conduct of an attorney." Pleas to a declaration in libel, that the alleged libel contained a faithful and true account of proceedings in a court of law, were held ill. (In error. *Cam. Scacc.*) *Clement v. Lewis*, 297

POLICY.

See INSURANCE.

POSTAGE OF LETTERS.

See COSTS, 8.

POUNDAGE.

See SHERIFF, 1.

POWER.

See DEVISE, 3.

PRACTICE.

And see COSTS. LIMITATION (*Statutes of*), 1. PLEADING, 1. WRIT OF INQUIRY.

1. Omission to add the *similiter*, is an irregularity for which the Court will set aside the verdict. *Griffith v. Crockford*, 1

2. Attachment of privilege returnable on the *essoign* day, and before the *quarto die post*, instead of being returnable on a day certain in full term, permitted to be amended on payment of costs. *Adams v. Luck*, 35

3. Error was assigned, in *Cam. Scacc.*, on a *minomor* of one of the plaintiffs below in the warrant of attorney, and also on the omission of any entry of verdict and judgment upon an issue joined, on a plea of set-off. The Court held, that there was nothing in the first objection, and gave leave to amend the transcript as to the second. *De Tastet v. Rucker*, 65

4. Where a *feme covert*, separated from her husband by a sentence of divorce *a mens et thoro*, was holden to bail while an appeal was still pending against the sentence, the Court, on motion, ordered the bail-bond to be cancelled, the *feme* filing a common appearance. *Hookham v. Chambers*, 92

5. In C. B., where a defendant under a rule nisi for that purpose files pleas of several matters, annexing to the plea a copy of the rule nisi, endorsed with a notice, that a rule absolute to plead several matters will be served as soon as it is drawn up, the plaintiff may not sign judgment as for want of a plea, if the time for pleading should expire before the rule absolute be obtained. *Maynard v. Bright*, 256
6. Plaintiff having omitted three terms after judgment to charge in custody defendant, who, after judgment, had surrendered in discharge of bail: Held, that the defendant was super-sedable, although, in the meantime, he had removed himself into another custody by *habeas corpus* in another action. *Morris v. Magrath*, 301

PRINCIPAL AND AGENT.

See DISTRESS.

PRISONER.

See COSTS, 1, 2. ATTACHMENT. PRACTICE, 6.

PRIVILEGE.

See ATTACHMENT.

PROCESS.

See PLEADING, 1.

PROMOTIONS.

See MEMORANDA.

PROMISSORY NOTE.

See FORGERY, 2.

PRUSSIAN TREASURY NOTE.

See FORGERY, 2.

PUBLIC ENTRIES.

See EVIDENCE, 3.

QUARE IMPEDIT.

See ADVOWSON.

RECEIPTS.

See EVIDENCE, 3.

REFERENCE.

See COSTS, 11.

RENT ARREAR.

See DISTRESS.

REQUESTS, COURT OF.

By the Rochester court of requests' act, 22 G. 3, c. 27, debts under 40s. contracted within the jurisdiction of the court, are to be sued for in that court; by 48 G. 3, c. 51, the jurisdiction of the court is extended to sums not exceeding 5l.; and plaintiffs suing in the

superior courts for sums recoverable under either of the acts, are to be refused costs, notwithstanding a verdict in their favour. But the latter act excludes any jurisdiction over debts being the balance of an account on demand, originally exceeding 5l. The plaintiff sued in a superior court for 34l. 5s. 1d., ascertained by a surveyor, appointed by the defendant and himself, to be due to him for measured work and labour, done within the jurisdiction of the court of requests. The defendant proved payments to the amount of 24l. 18s., and the jury estimating the work at only 28l., found for the plaintiff only 1l. 2s. damages: Held, that this was not a case in which the defendant was entitled under 48 G. 3, c. 51, to enter a suggestion to deprive plaintiff of his costs. *Harsant v. Larkin*, 257

RULES OF THE FLEET.

See ATTACHMENT.

SAIL-CLOTH.

See PATENT.

SCHOOLMASTER.

See DEEDS.

SEAWORTHINESS.

See INSURANCE, 4.

SECRETARY AT WAR.

See OFFICER, PUBLIC.

SHERIFF.

And see EVIDENCE, 1, 2.

1. A sheriff who levies under a *levari facias* for a crown debt, is not entitled to poundage under the statute 29 Elis. c. 4, and consequently, an action against him under that act, for extortion in such a case, is misconceived. *Stevens v. Rothwell*, 143
2. Under an execution by A. against B., the Court will not order the sheriff to pay over money in his hands levied on an execution by B. against C. *Padfield v. Brine*, 294

SHIP.

See INSURANCE, 3, 4.

STAMP.

1. A conveyance by debtors to trustees, in trust to sell, and with the proceeds to discharge first, debts due to the trustees, then debts due to other creditors, with a resulting trust for the original debtors, does not require an *ad valorem* stamp, as upon a sale or mortgage under 55 Geo. 3, c. 184. By three Judges (Dallas, C. J., *absente*). *Coates v. Perry*, 48
2. Held, that an agreement (dated October 27, 1819, and stamped with a 20s. stamp) between landlord and tenant, that the landlord should have immediate possession (except as was mentioned) of a farm, lands, and premises, which had been occupied by the

tenant for a term, the landlord to take the stock, and the tenant to hold over half the house, half the stable, the barns, and an enclosed ground, and to have the joint use of the yard with the landlord or incoming tenant, till the 25th January following, without rent, &c., was properly rejected in evidence, on the ground that it operated as a surrender of the term, and therefore required a deed stamp, under 55 G. 3, c. 184, sched. part 1. *Williams v. Sawyer*, 70

3. Demise to A. of a slate pit at B., and stone quarries at C., to hold to A. the slate pit at B. from the 25th March, 1815, for the term of fourteen years, and the stone quarries at C., from the 29th September, 1817, for the term of fourteen years, paying for the slate pit the yearly rent of 70*l.*, and for the stone quarries the yearly rent of 130*l.* The *ad valorem* stamp on the first skin of the lease was 3*l.*, with a progressive duty of 1*l.* on the other skins. It appeared that possession could not be given of the stone quarries at the same time with the slate pit, nor till the time mentioned in the lease. The Court being of opinion that no fraud was intended: Held, that this lease was properly stamped under 55 G. 3, c. 184. *Boase v. Jackson*, 185

SUGGESTION.

See REQUESTS, COURT OF.

SUPERSEDEAS.

See PRACTICE, 6.

SURETY.

See EVIDENCE, 3.

SURVEYOR.

See LIMITATION OF ACTIONS.

SURVIVORS.

See AGREEMENT.

THAMES NAVIGATION.

See PILOT ACT.

TROVER.

See BANKRUPTCY, 2.

TRUSTEE.

See STAMP, 1.

UNDERWRITERS.

See INSURANCE.

USE AND OCCUPATION.

See EVIDENCE, 4.

VARIANCE.

Covenant to pay (among other instalments) an instalment within twelve calendar months

from, &c. On the record the word "calendar" was omitted: but the record stated correctly the time of payment of other previous and subsequent instalments, without omitting the word "calendar:" Held, that this was no variance. *Cockell v. Gray*, 186

VENDOR AND PURCHASER.

See AUCTION.

VENIRE DE NOVO.

See WRIT OF INQUIRY.

VERDICT.

See COSTS, 11, and WRIT OF INQUIRY

VESTRY.

See DEEDS.

WARDEN OF THE FLEET.

See ATTACHMENT.

WAR OFFICE.

See OFFICER, PUBLIC.

WARRANT.

See BANKRUPTCY, 3.

WARRANT OF ATTORNEY.

See PRACTICE, 3.

WINE.

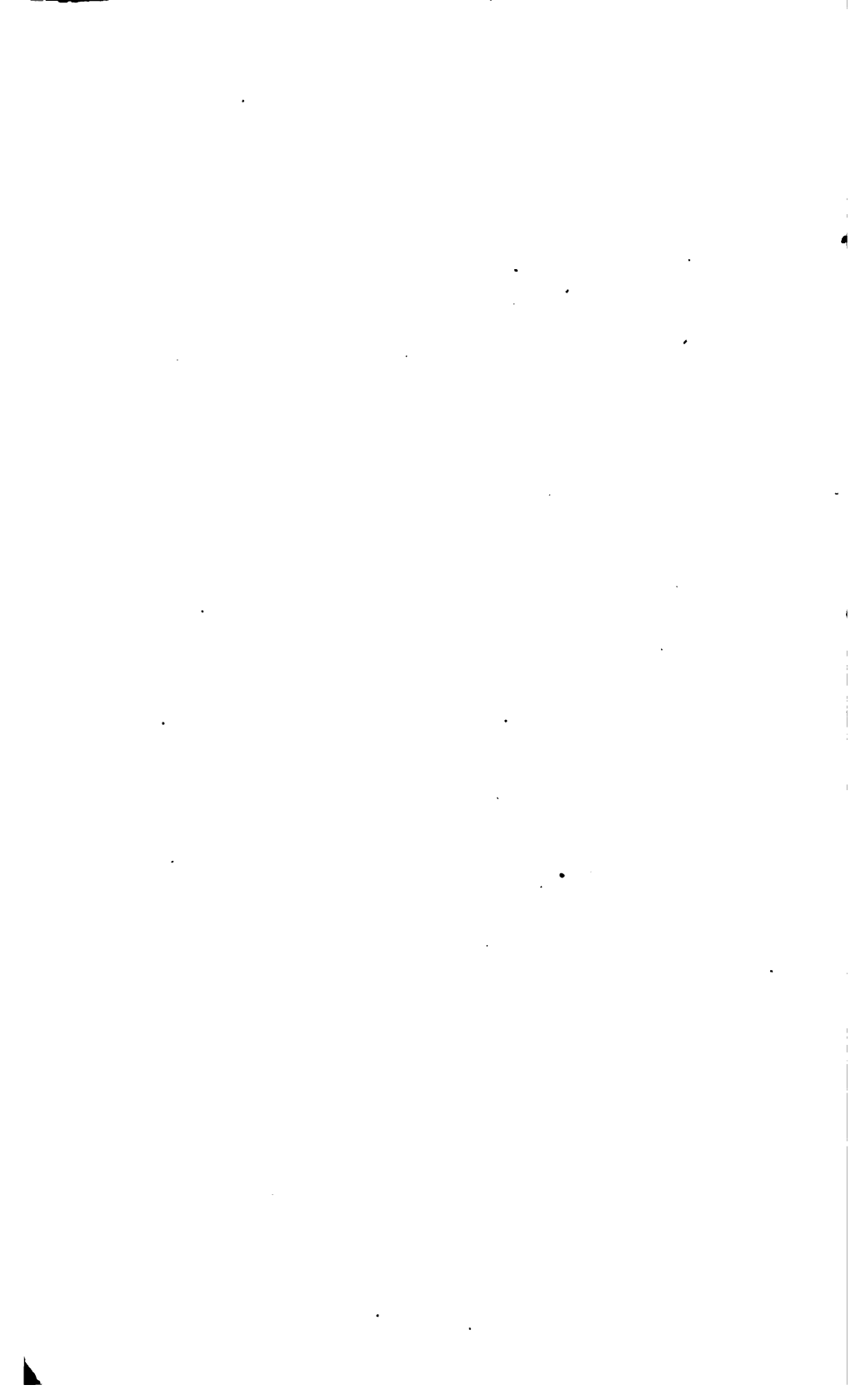
See INSURANCE, 1.

WITNESS.

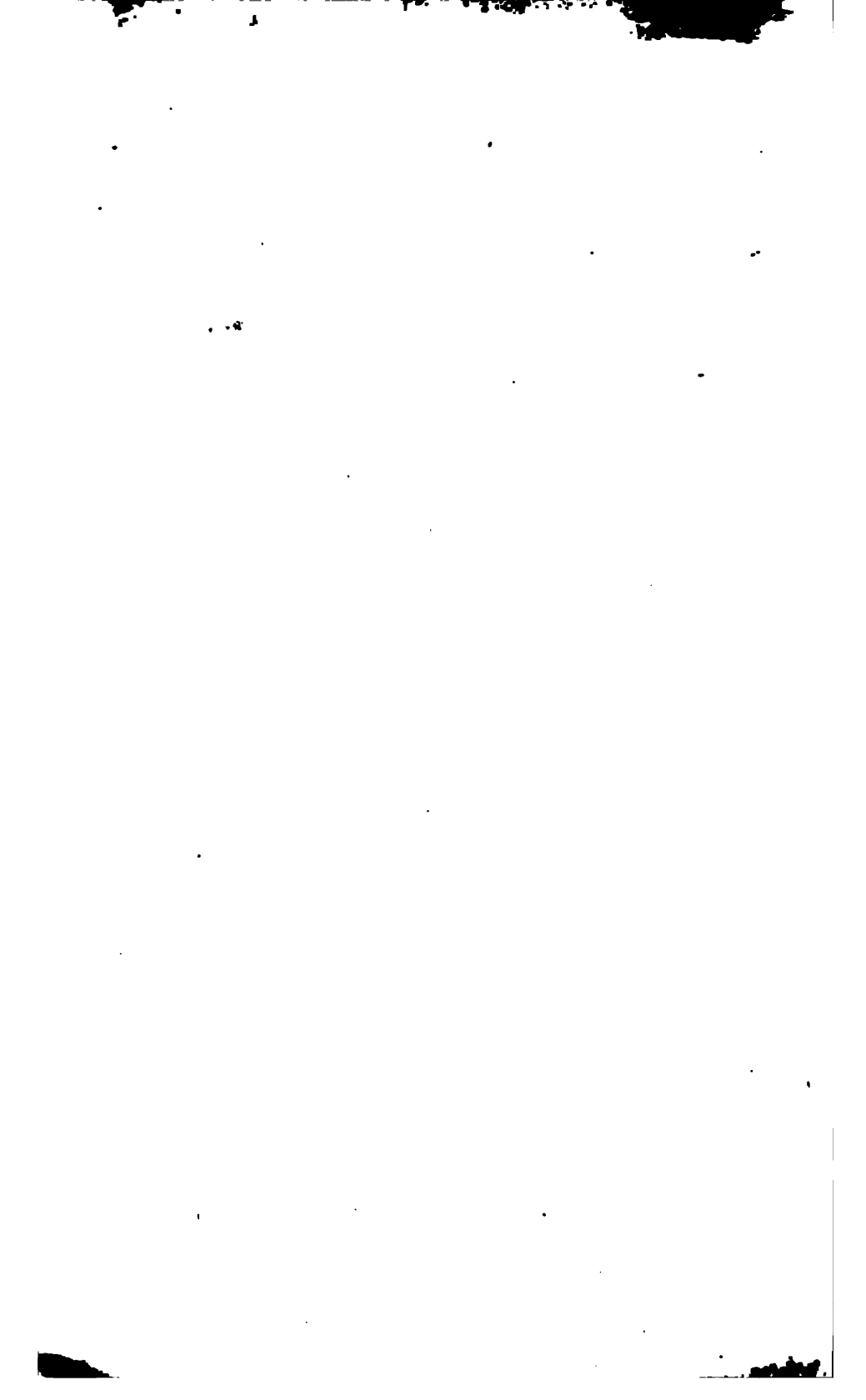
See COSTS, 3, 9, 10, and OATH.

WRIT OF INQUIRY.

The jury having found for the defendant on six out of eight pleas comprehended in the last two issues, and for the plaintiff on the residue of those pleas, and on the first issue without assessing damages; and the plaintiff having, pursuant to the decision of the Court of K. B., entered up as to the pleas found for the defendant, judgment *non obstante verdicto*, with an award of a writ of inquiry, and final judgment for the damages found by the inquiry, &c.: a Court of Error (Cam. Scacc.) reversed the judgment of the Court of K. B., as to the award of the writ of inquiry and the final judgment thereon—remitted the record to the Court of K. B.—and directed that Court to award a *venire de novo* to try the first issue and the last, as far as related to the pleas on which the finding was for the plaintiff; holding, that the verdict found for the plaintiff on the first issue, and on the last (as far as regarded the pleas on which the finding was for the plaintiff) was void, because no damages had been assessed. *Clement v. Lewis*, 297







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